Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Public Utility District No. 1
of Pend Oreille County, Washington,

Petitioner,

v.

United States of America, and
Kalispel Tribe of Indians,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals and the United States District Court have jurisdiction to review, construe, amend or modify licensing orders issued by the Federal Power Commission under the Federal Power Act thirty years after such orders were issued by the Federal Power Commission.

2. Whether the holding in United States v. Clarke, 445 U.S. 253 (1980), should be overruled or distinguished as inapplicable in this case when (a) the FPC licensed the PUD's operations, (b) the Acting Secretary of the Interior approved alternative remedy in the FPC license, (c) the ownership of land was unknown until this litigation was concluded, and (d) a condemnation action was immediately commenced after the ownership issue was resolved.

3. Whether the United States Court of Appeals have the judicial power to reverse and overrule Findings of Fact entered by the district court which are supported by substantial evidence where there is no evidence or record to support the decision of the Court of Appeals.

PARTIES BEFORE THE NINTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT

Petitioner:

Public Utility District No. 1 of Pend Oreille County (PUD) is a municipal corporation organized under the laws of the State of Washington which owns and operates a hydroelectric project licensed under the Federal Power Act and which distributes electric power in Pend Oreille County, State of Washington. The PUD was an appellee before the United States Court of Appeals for the Ninth Circuit in The United States of America v. Pend Oreille Public Utility District No. 1, 28 F.3d 1544 (9th Cir. 1994). The PUD was a defendant in United States of America v. Pend Oreille County Public Utility District No. 1, Docket No. C-80-116 in the United States District Court for the Eastern District of Washington.

Respondent:

The Respondent is the United States of America, an appellant before the United States Court of Appeals, Ninth Circuit, and the plaintiff in the United States District Court for the Eastern District of Washington.

Other Parties Below:

The Kalispel Indian Tribe was an appellant before the United States Court of Appeals, Ninth Circuit, and was an intervenor-plaintiff before the United States District Court for the Eastern District of Washington.

Other Parties Below (continued)

The State of Washington was an appellee before the United States Court of Appeals for the Ninth Circuit and was an intervenor-defendant before the United States District Court for the Eastern District of Washington. No issue herein affects the interests of the State.

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NO. _____

IN THE
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of Pend Oreille County, Washington,
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App. 4a) is reported at 28 F.3d 1544. The Ninth Circuit Court's Order denying rehearing was issued and filed on September 14, 1994 (App. 1a). The "Findings of Fact, Conclusions of Law, and Judgment" of the United States District Court for the Eastern District of Washington were filed on August 10, 1987 (App. 33a).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on July 14, 1994. The Order denying the Petition for Rehearing was filed on September 14, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

Section 6, Federal Power Act.

> "Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743, Revised Statutes, as amended (U.S.C. title 41, sec. 20)." [16 U.S.C. § 799]

Section 313(b), Federal Power Act.

"Any party to a proceeding under this Act aggrieved by an order by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the

court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)." [16 U.S.C. § 825*l*(b)]

STATEMENT OF THE CASE

1. Nature of the Controversy.

This matter involves a claim for damages in trespass alleged by the United States on behalf of Kalispel Indians made 28 years after a license was issued by the Federal Power Commission pursuant to the Federal Power Act, and 17 years after the license was last amended. The PUD and the State of Washington claimed that the lands at issue were owned by the State. The trial court (the United States District Court for the Eastern District of Washington) resolved the property ownership dispute between the United States and the Kalispel Indian Tribe and the State of

Washington and the PUD.[1] The issues in the district court and the Ninth Circuit Court of Appeals were heard and determined in three phases: Phase I involved a property boundary-line of ordinary high water; Phase II involved ownership of river bed by Tribe or State; Phase III involved all other issues including damages, eminent domain/ condemnation, injunctive relief, and other claims. The claims arising under Phase I and Phase II were decided by the Ninth Circuit Court of Appeals in 926 F.2d 1502. The remaining claims were decided in 28 F.3d 1544 (9th Cir. 1994). It is the last decision of the Ninth Circuit Court of Appeals for Phase III that gives rise to this petition.

2. Facts Relating To The 1952 FPC License As Amended In 1963.

The FPC licensing orders are set forth in the Appendix at 47a (1963), 50a (1956) and 53a (1952). The 1952 License Order expressly recognized that the Box Canyon Project would affect "allotted lands within Calispel [sic] Indian Reservation." (App. 54a) The Box Canyon Project includes all lands within the project boundary "or the limits of which are otherwise defined... ." (App. 54a) The Box Canyon Project includes a reservoir backing water 55 miles upstream. (App. 55a) The Commission made an express finding that:

> (6) The issuance of license for the project as hereinafter provided will not interfere or be

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[1] See United States v. Pend Oreille Public Utility District No. 1, 926 F.2d 1502 (9th Cir. 1991), cert. denied, sub nom., Washington Department of Natural Resources v. United States, __ U.S. __, 112 S.Ct. 415, 116 L.Ed.2d 436 (1991).

> inconsistent with the purposes of any withdrawal of public lands nor with the purposes for which the Kaniksu National Forest was created or acquired.

(App. 61a) The Commission included Article 33 (App. 64a) which provides as follows:

> Article 33. The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Calispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel Indian Community Council and the Licensee.

When the 1952 licensing order was issued, the Commission included Article 33 based upon the request by the Acting Secretary of the Interior. (Compare Article 33 (App. 64a) with the Condition 7 requested by the Acting Secretary of the Interior. (App. 67a at 72a and 74a)) After the 1952 license was issued, the PUD acquired easements to various parcels of land on the Kalispel Indian Reservation. (See District Court Findings of Fact and Conclusions of Law and Judgment, Finding No. 5 (App. 36a))[2]

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[2] The PUD paid grazing value for the land, a fact that was proven to the district court. Grazing value was used by the district court to determine damages.

In 1956, the Commission approved all of the exhibits, including the exhibits showing the project boundary and the project area. (App. 50a) In 1963, the Commission approved an amendment to the license which allowed the PUD to raise the 55-mile reservoir and allowed the PUD to impose backwater on the Albeni Falls Project of the Corps of Engineers, Department of the Army, from one foot as provided in the 1952 license to two feet as provided in the 1963 license amendment. (App. 47a)

3. PUD Actions After 1963 And Prior To 1980.

After the license was amended in 1963, the PUD attempted to obtain additional easements from the United States, but was thwarted by delays by the government and the Tribe. (Finding No. 9, App. 37a, at 39a) The district court concluded that "the PUD did not act in bad faith." (App. 39a) There was a dispute over the ownership of the land affected by the Box Canyon Dam between the United States on behalf of the Indians and the Kalispel Indian Tribe and the State of Washington. The State claimed the lands under the equal footing doctrine. United States v. Pend Oreille Public Utility District No. 1, 926 F.2d 1502, 1505-1511 (9th Cir. 1991). After the district court determined ownership, the PUD commenced a condemnation action. See District Court Finding No. 15 (App. 41a) and United States v. Pend Oreille Public Utility District No. 1, 28 F.3d 1544, 1553 (9th Cir. 1994). The Ninth Circuit Court's 1994 opinion remanded the matter for further determinations with

respect to condemnation. (Id., App. 23a) The right of the PUD to condemn allotted land is clear.[3]

In March 1980, the United States commenced an action in the United States District Court for the Eastern District of Washington claiming trespass and damages rather than complete the easement process. The action was commenced within two weeks from the entry of this Court's decision in United States v. Clarke, 445 U.S. 253 (1980).[4] Prior to the decision in United States v. Clarke, a landowner could only

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[3] The PUD clearly has a right to condemn allotted Indian land. Section 21 of the Federal Power Act [16 U.S.C. § 814]; and 25 U.S.C. § 357. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

[4] The court's decision in United States v. Clarke reversed a decision and opinion authored by Judge Anthony M. Kennedy, 590 F.2d 765 (9th Cir. 1979). The facts in this PUD case are distinguishable from the facts in United States v. Clarke: (1) in this case, the PUD holds a license which authorized a reservoir affecting Indian lands; (2) the Federal Power Act authorizes the condemnation of lands if the licensee cannot otherwise acquire such lands by contract or pledge (16 U.S.C. § 814); (3) the PUD attempted to acquire such lands in good faith and it was the United States and the Indians that delayed the land acquisitions; and (4) the lands affected by the Box Canyon reservoir were subject to a dispute over ownership between the State of Washington and the United States and the Indians. Under these circumstances, the PUD should be held to have lawfully operated the Box Canyon Project under the FPC license. As will be discussed, infra, the PUD contends that neither the District Court nor the Ninth Circuit Court of Appeals had jurisdiction to rule on the legality of the PUD's operations under its license.

obtain just compensation in "inverse condemnation" for land entered by a person possessing a right of eminent domain. United States v. Clarke, 590 F.2d 765 (9th Cir. 1979).

4. Injunction Denied By District Court.

In this proceeding, the United States sought an injunction to prohibit the PUD from operating the Box Canyon Project in accordance with the terms and conditions of the license issued by the Federal Power Commission - holding the 55-mile reservoir at a level not to exceed two feet of backwater on the Albeni Falls Dam so long as the reservoir did not cause flooding above the level reached by the Pend Oreille River flowing at 90,000 cfs, the mean annual high water or mean annual flood. The district court denied the government's request for injunctive relief. (App. 41a and 43a)

The United States and the Tribe sought an injunction to bar the PUD from affecting any Indian land within the Kalispel Indian Reservation. Such injunction would prohibit the dam operation as provided by the FPC licensing order. The record before the district court showed that the PUD had attempted to obtain easements from the United States, in good faith, and that the PUD was frustrated by unreasonable and unexplained repeated delays by the United States and the Tribe. (See District Court Finding No. 9, App. 37a-39a; and Findings 15 and 16, App. 41a) The district court found that the Kalispel Indians would not suffer irreparable harm from continued operations and would be justly compensated for any loss.

5. Damages Determined By District Court.

In the action, the government sought damages on behalf of the Indian owners of the affected lands. The district court noted the language of Article 33 of the license (App. 34a and 64a) and, based on all the evidence, determined the amount of damages to be paid by the PUD for the years from 1956 through 1986 on an annual basis based upon actual use of similar land for cattle grazing. (App. 41a, 43a, and 45a-46a)

6. The Ninth Circuit Court Of Appeals Assumed Erroneous Facts And Reversed The District Court.

The United States and the Kalispel Indian Tribe appealed from the decision of the Court with respect to damages and the denial of the request for an injunction. The PUD appealed from decisions of the district court dismissing the PUD's counterclaim in condemnation and rejecting the PUD's request for declaratory judgment concerning the determination of future damages based upon the same formula determined by the district court. (See App. 41a and 45a-46a)

The United States Court of Appeals reversed the district court on the issue of damages and injunctive relief (App. 12a-20a, 28 F.3d at 1549-1552) and determined that the PUD was guilty of "trespass" and determined that the 1952, 1956 and 1963 Orders of the Federal Power Commission were not authorized by the Federal Power Act and did not authorize the PUD's long-standing operation of the Box Canyon Dam (App. 8a-11a). The Court of Appeals affirmed the district court with respect to the refusal to grant declaratory relief regarding the calculation of future damages (App. 20a-21a).

The Court of Appeals authorized and provided for the issuance of an injunction barring the PUD's long-standing dam operations under its FPC license. The Court of Appeals also made other rulings which are not material to this petition.

The PUD contends that the appellate court's review of the issue of trespass, injunctive relief and damages was, in fact, a judicial review of the licensing orders issued by the Federal Power Commission thirty to forty years ago. (See App. 8a-11a) The appellate court reversed the district court's findings by conducting a limited review of selected portions of the licensing orders and correspondence in the Commission files, but without the benefit of the entire record before the district court or the Federal Power Commission. (See App. 9a-11a, 28 F.3d at 1547-49) In fact, the appellate court made numerous statements alleging facts which have no basis in any findings by the district court or in any record before the district court and which are expressly refuted by the findings and determinations made by the Federal Power Commission.[5] In essence, the appellate court reviewed the

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[5] (A) The appellate court concludes that the issue of trespass was decided by the court in its previous opinion. In reaching such conclusion, the appellate court ignores the fact that the court's own orders provided that in Phase I and Phase II the parties were to brief the issue of ordinary high water mark and the issue of aboriginal title to the stream bed, and that all of the other issues were to be briefed later in Phase III, which issues included the issue on trespass. The appellate court's procedural orders are shown at App. 26a-32a. Thus, the gratuitous statement of the appellate court in its first opinion with regard to trespass was mere

(continued...)

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[5](...continued)
dicta. The statements are set forth at 926 F.2d at 1505.

(B) The appellate court went on to review and reach conclusions concerning Article 33 of the 1952 FPC license. The appellate court only reviewed the language of Article 33 and did not review the entire 1952 license language. The appellate court selected language from a letter to the Commission but ignored the remainder of the language of that letter, which is set forth at App. 67a et seq. The appellate court concluded that the United States could file a trespass action despite the actions and the statements of the Secretary of the Interior to the Federal Power Commission in the 1952 letter, the ongoing negotiations between the PUD and the Bureau of Indian Affairs referred to in the trial court's Finding No. 9, and the fact that the Federal Power Commission had concluded that the lands affected by the Box Canyon Project were "allotted lands."

(C) The appellate court concluded that the Commission failed to make findings as required by § 4(e) of the Federal Power Act [16 U.S.C. § 797(e)]. (App. 10a, 28 F.3d at 1548) The appellate court ignored the clear statement by the Commission that the project would occupy allotted lands within the Indian Reservation (App. 53a) and the findings of the Commission that the project would not interfere or be inconsistent with the purposes of any withdrawal of public lands (Finding (6) at App. 61a).

(D) The appellate court made general conclusions that the Secretary of the Interior did not determine the conditions necessary to protect the Indian Reservation and that the Commission did not fix an annual charge for use of "Reservation land." (App. 10a, 28 F.3d at 1548) Again the appellate court ignored the Commission's conclusion that the project would occupy "allotted lands within

(continued...)

licensing orders of the Federal Power Commission thirty to forty years after those orders were issued, and long after such orders were final and not subject to review under § 313(b) of the Federal Power Act [16 U.S.C. § 825ℓ(b)].

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[5](...continued)
Kalispel Indian Reservation" and the Secretary's conditions for the project - the project should not cause additional flooding during flood flows (the mean annual flood of 90,000 cfs), and that the PUD should pay just compensation which would be determined by the Secretary after consultation with the PUD. (See App. 58a-59a, 64a (Article 33), 72a and 74a) The appellate court concluded that the PUD flooded Indian land "only after the Kalispel Indians refused to grant similar easements." (See note 2 at App. 8a, 28 F.3d at 1547) This erroneous statement by the appellate court was made without any record or any evidence, and is factually untrue. The PUD flooded the lands under the assumption that (1) the lands belonged to the State, and/or (2) the United States would negotiate in good faith and grant an easement, as it had after the 1952 FPC Order.

(E) The appellate court concluded that the PUD failed to disclose "that Reservation land would be flooded by the project." (App. 10a, 28 F.3d at 1548) Without any record or evidence, the appellate court disregarded the clear language of the 1952 Commission order. The Commission acknowledged that the project would affect "allotted lands within Calispel [sic] Indian Reservation." (App. 53a) The court's conclusion also ignores the statements made by the Acting Secretary of the Interior in his letter to the Federal Power Commission. See App. 67a at 72a and 74a) The Secretary was fully informed about the Box Canyon Project. The appellate court's conclusions with respect to the PUD have no basis in fact or in the evidence.

REASONS FOR GRANTING THE PETITION

1. This Court Should Resolve The Important Federal Question Concerning The Validity Of The Rights Of A Licensee Under The Federal Power Act When Challenged Under The Guise Of A Trespass Action In A United States District Court.

This case involves an attempt by the United States and the Kalispel Indian Tribe to require the PUD to change its operation of a hydroelectric project duly licensed by the Federal Power Commission under the Federal Power Act [16 U.S.C. § 791a, et seq.] forty years after the license was issued and thirty years after it was amended. The decision of the Ninth Circuit Court of Appeals would require the PUD to either involuntarily apply to the Federal Energy Regulatory Commission to amend the PUD's license in order for the PUD to continue operating its project in the same manner that it has operated such project for the past thirty years OR to cease operating such project in such manner and thereby reduce the output of the licensed project. See the Ninth Circuit Court's opinion reversing the district court which denied an injunction and the remedy suggested by the Ninth Circuit Court. (App. 18a-20a, 28 F.3d at 1551-52)

By its opinion, the appellate court concluded that the PUD was not authorized, by the FPC license, to affect the Indian lands. Yet, the FPC license expressly acknowledge that the Box Canyon Project would affect allotted Indian lands on the Kalispel Indian Reservation (App. 53a) and the license included Article 33 which was expressly requested by the Acting Secretary of the Interior (App. 64a, 72a, and 74a).

The effect of the decision of the appellate court is to overrule and reverse the Federal Power Commission with respect to the construction and operation of the Box Canyon Dam. In 1952, the PUD was authorized to construct the Box Canyon Project and to operate the project by creating a reservoir 55 miles in length and raising the water on the tailrace of the Albeni Falls Project constructed and operated by the Corps of Engineers, United States Department of the Army, for flows up to 90,000 cfs. (App. 60a and 70a) The appellate court mistakenly noted in its opinion (App. 10a, 28 F.3d at 1548) that "the license stated the water level would be higher in normal flows 'for possibly 24 miles upstream.'" The statement in the license is as follows:

> (4) In the river channel immediately above the proposed Box Canyon dam and for possibly 24 miles upstream, the water level will be higher than under natural conditions for flows up to about 90,000 cubic feet per second due to the operation of the Box Canyon project, but with the same flows, water levels farther upstream will differ little from natural conditions. For flows above 90,000 cubic feet per second, the operation of the project will have little if any effect on water levels. In general, damage to privately owned lands will be small but will have to be compensated for by the licensee where it does occur. ...

(App. 58a-59a) This is the difficulty that arises when an appellate court, without a record before it, makes mistaken assumptions of fact and then relies on those assumptions in reaching its ultimate conclusions. The facts are indisputable

and clear. The Federal Power Commission was fully informed concerning all aspects of the Box Canyon Project and its effects on the navigable Pend Oreille River for the 55-mile stretch from the Box Canyon Dam to the Albany Falls Project. As noted by the appellate court, the Kalispel Indian Reservation was located thirty miles upstream from the Box Canyon Dam or approximately midway between the Box Canyon Dam and the Albany Falls Project. Yet, for reasons that are not explained by the court's opinion, the court assumed that the Federal Power Commission was misinformed concerning the impacts of the Box Canyon Project when it issued the license in 1952. (App. 10a, 28 F.3d at 1548)

The appellate court also erroneously assumed that any or all of the lands affected by the Box Canyon Project were tribal lands embraced within a reservation which required the fixing of a reasonable annual charge. (App. 10a, 28 F.3d at 1548) This assumption on the part of the appellate court flies in the face of the express statement in the 1952 Commission Order that the lands affected by the project within the Kalispel Indian Reservation were, in fact, "allotted lands." (App. 53a) Allotted lands are subject to condemnation under § 21 of the Federal Power Act [16 U.S.C. § 814] and under 25 U.S.C. § 357. Therefore, the reliance by the appellate court on § 10(e) of the Federal Power Act [16 U.S.C. § 803(e)] is misplaced.

Finally, the appellate court referred to the location of the project boundary six miles downstream from the Kalispel Indian Reservation, apparently as an indication that the Federal Power Commission was uninformed by the PUD and acted without knowledge of the facts. Nothing could be

further from the truth. It is evident that in 1952 the Commission had a full understanding of the project and had an extensive record before it. (See the 1952 Commission Order, App. 53a et seq.) Furthermore, it is also clear that the Acting Secretary of the Interior had a full and complete understanding of the effects of the project. (See the Acting Secretary's 1952 letter, App. 67a et seq.) With full and complete information before it, the Commission approved project exhibits, including an exhibit showing the project boundary. (1956 Commission Order, App. 50a et seq.) Finally, in 1963 the Commission approved the raising of the 55-mile reservoir from one foot of backwater on the Albeni Falls Project to two feet of backwater on the Albeni Falls Project and approved revised project exhibits. (1963 Commission Order, App. 47a et seq.)

The PUD contends that neither the district court nor the appellate court had the jurisdiction or the authority to review the Orders issued by the Federal Power Commission in 1952, 1956 and 1963, or to reach conclusions that the Commission erred in reaching its decisions or that the Commission's decisions should be construed differently than the construction given those decisions for more than thirty years by the Commission, and until 1980 by the Secretary of the Interior. By reviewing the Commission decisions and then reversing the district court with respect to damages and providing for an injunction requiring the PUD to change its operations, the appellate court has invaded the jurisdictional bar created by Congress under § 313(b) of the Federal Power Act [16 U.S.C. § 825*l*(b)] and has violated the PUD's rights protected by § 6 of the Federal Power Act [16 U.S.C. § 799]. This Court should grant certiorari in this matter and determine the jurisdiction of the district court and the

appellate court herein with respect to the issues arising under the Federal Power Act.

2. The Federal Energy Regulatory Commission Has Primary Jurisdiction Under The Federal Power Act.

The appellate court erroneously concluded that the PUD was not authorized to inundate the Indian lands within the Kalispel Indian Reservation pursuant to the licensing orders, and that the PUD should be enjoined unless the PUD amended its license or lowered the reservoir.[6]

Rather than concluding that the Commission or the PUD violated law and that the PUD trespassed on Indian lands, the appellate court should have recognized that it had no

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[6] The appellate court reversed the district court's findings and conclusions denying the injunction requested by the United States. This conclusion was based, in part, on the erroneous presumption that the lands at issue were tribal lands which cannot be condemned and the conclusion that the United States is not bound by Article 33 of the license which was requested by the Acting Secretary of the Interior. (App. 9a [28 F.3d, 1548], and App. 18a-20a [28 F.3d, 1551-1552]). The appellate court then apparently concluded that the district court should issue an injunction with the possibility of a stay if the PUD seeks an amendment of its license to satisfy the Federal Power Act requirements of § 4(e) and § 10(e), which the appellate court presumed had either not been satisfied when the 1952 license was issued. As previously stated, such presumption is dependent upon the conclusion that tribal lands within the reservation were affected in 1952 or in 1963, a presumption for which there is no record either before the Commission, before the district court, or before the Secretary of the Interior. See App. 20a, 28 F.3d 1552.

jurisdiction over such matters or should have abstained from rendering an opinion on such matters. As previously discussed, the collateral attack on the PUD's rights under the FPC licenses is untimely, and the district court and the appellate court had no jurisdiction to review or attack the PUD's rights under such license. The appellate court should have recognized that the Federal Energy Regulatory Commission (FERC) has primary jurisdiction to enforce its own licensing orders, and the appellate court should have abstained from rendering opinions concerning such licensing orders in the absence of a determination by the FERC pursuant to the Federal Power Act. The United States should have sought a remedy affecting dam operations from the FERC. The Federal Power Act includes § 306 [16 U.S.C. § 825e], which authorizes any person to file a petition with the Commission if a person believes that a licensee may have violated any provision of a license. The Commission is required to investigate such matters. (Id.) In 1986, Congress gave additional enforcement powers to the Commission. (16 U.S.C. § 823b, added by PL 99-495, § 12, 100 Stat. 1255 by Act of October 16, 1986)

Congress has prescribed an exclusive means by which decisions are to be made under the Federal Power Act. Under § 313(b) [16 U.S.C. § 825ℓ(b)], a person aggrieved by an order of the Commission is first required to timely file a petition for rehearing. If such petition is denied, the aggrieved person is then required to timely file a petition for judicial review in the appropriate court of appeals. All issues that were raised or which could have been raised are deemed to have been decided in the proceeding. No other court has jurisdiction to decide issues arising under the Federal Power Act, the decision of which was delegated by Congress to the

Federal Power Commission, now the FERC. Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958). The district court had no jurisdiction to determine the validity or the adequacy of the FPC licensing orders. Id. See also California Save Our Streams Council v. Yeutter, 887 F.2d 908 (9th Cir. 1989); and DiLaura v. Power Authority of the State of New York, 982 F.2d 73 (2d Cir. 1992). Although the court of appeals did not state the basis of its jurisdiction in its opinion, its jurisdiction is derived solely from 28 U.S.C. § 1291 (appeal of final decisions of the district court). Appellate courts are obligated to satisfy themselves as to their own jurisdiction and the jurisdiction of the District Court. Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986). Federal courts are not courts of general jurisdiction. They only have the power that is granted under Article III of the United States Constitution and by statutes enacted by Congress within the authority granted by the Constitution. Id. Here, Congress neither granted the appellate court nor the district court jurisdiction to review or overrule orders entered by the Federal Power Commission under the Federal Power Act thirty to forty years after those orders were entered. Thus, the appellate court's determination that the Commission was mislead by the PUD and that the Commission's orders violated § 4(e) and § 10(e) of the Federal Power Act and that the district court should enjoin the PUD's operation of the Box Canyon Dam under the PUD's license are invalid and have no effect as being beyond the jurisdiction of the district court and the court of appeals.

Not only did the appellate court, and the district court, lack jurisdiction to review the licensing orders of the Federal Power Commission, but the appellate court failed to

recognize that Congress has delegated the exclusive power over the terms and conditions of licenses to the Federal Power Commission (now the Federal Energy Regulatory Commission) under the Federal Power Act. See Tacoma v. Taxpayers of Tacoma, supra. Even if the appellate court suspects, and in this case assumed, that the PUD withheld facts from the Commission and the Secretary of the Interior, neither the district court nor the appellate court had the necessary jurisdiction to determine such questions or issues. That is not to say that there was no forum for such determination. In fact, there was a forum for such determinations in 1952 and 1963 when the principle licensing orders were issued. At that time, the forum was the Federal Power Commission and the Federal Power Commission made the decision based upon the record before it, which included submissions by the Secretary of the Interior and members of the Kalispel Indian Community. (See the 1952 licensing order.) As previously shown, if, at this late date, the United States believes that the licensing orders should be amended or that the PUD has violated such license, such issue should first be presented to the administrative agency which made those decisions in the first instance. However, it must be recalled that the Federal Power Act does not authorize unilateral amendment of licenses by the agency or even by Congress. (§ 6 of the Federal Power Act [16 U.S.C. § 799], and § 28 of the Federal Power Act [16 U.S.C. § 822])

3. Federal Courts Should Construe Federal Licenses In A Manner Which Is Consistent With The Intent Of The Agencies.

The appellate court has eviscerated license Article 33. While doing so, the appellate court made several assumptions

that are not supported by the record before the Court. The Court assumed that the PUD was malevolent (App. 8a, note 2; 28 F.3d at 1537, note 2). The appellate court ruled that Article 33 does not authorize the PUD "to flood Reservation land" (App. 8a, 28 F.3d 1548) and entirely ignores express language in the license (and also in the record before the Court) that the FPC intended for the PUD to affect "allotted lands within Calispel (sic) Indian Reservation." (App. 53a) The appellate court concluded that even though Article 33 created an administrative remedy, such "administrative remedy" was not "intended to affect the rights of the Tribe and the United States if they chose instead to file a trespass action in federal court, as they did." (App. 9a, 28 F.3d at 1548) Of course, the trespass action was filed 30 or 40 years after the remedy was created and more than 30 years after the remedy had been construed by the Secretary of the Interior when it granted the original easements to the PUD. The appellate court ignored the fact that the PUD had made a good faith effort to obtain new easements, which are authorized by law. See 25 U.S.C. § 323. The appellate court failed to point out that the PUD was frustrated in its efforts to obtain easements by the delays of the United States and the Tribe, as determined by the district court. (See Finding No. 9, App. 37a-39a) The appellate court placed no significance upon the fact that Article 33, as ambiguous as it may be, was requested as a condition by the Acting Secretary of the Interior. (App. 67a at 72a and 74a) The appellate court then went on to assume that the lands affected by the Box Canyon Dam are tribal lands, not allotted lands as originally determined by the Commission. (See the references to the Tribe and Tribal Lands in the court's opinion, i.e. App. 9a-10a (28 F.3d at 1548) and 14a-16a (28 F.3d at 1550). The appellate court assumed that the district

court erroneously applied state law. (App. 13a-18a, 28 F.3d 1549-1551)

The appellate court had no basis for such assumptions. Neither the United States nor the Tribe presented any part of the transcript of proceedings to the appellate court. (See the U.S. Attorney's letter re: transcript, App. 76a) The appellate court breached its own standards for reviewing district court decisions. Ninth Circuit Rule 30-1.2 requires a party challenging any district court finding to provide the circuit court with a reporter's transcript recording any discussion by the district court or counsel on the issue. Here no transcript was designated by the United States for its appeal. Generally, court findings will not be reviewed without a transcript. Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 976 (10 Cir. 1991); and Powell v. Estello, 959 F.2d 22, 26 (5th Cir. 1992), cert. denied sub. nom., Harrison v. McKaskle, __ U.S. __, 113 S.Ct. 668, 121 L.Ed.2d 592 (1992).

In these proceedings, the appellate court turned the PUD's 1952 license upside down. Rather than affirm the damages determined by the district court based upon the evidence presented by the United States and based upon the entire record before the district court, which was not before the appellate court, the appellate court reversed the district court's on the damages to be awarded and stated as follows:

> Although use of the value of the tribal lands as part of the power project in calculating the annual charges not compelled by regulation or case law, we nevertheless conclude it is the most acceptable measure of damages for the Utility's trespass. As noted, the

> power site formula was reflected in the governing regulation prior to 1938, and the United States has advised the Court this is the formulation now applied by the Commission in fixing annual charges for use of tribal lands on all power projects. Its use will also assure the Tribe will not suffer an uncompensated loss from the Utility's past failure to comply with the Power Act and will encourage future compliance.

(App. 17a, 28 F.3d at 1551). Such statements and conclusions by the appellate court acknowledged that it would be "a matter of conjecture" to speculate in 1994 concerning the actions that the Commission may have taken in 1952 under different facts. (App. 15a, 28 F.3d 1550) The appellate court erroneously assumed, for the purposes of its opinion, that the different facts actually exist and that those facts were unknown to the Commission. There is no basis for such assumptions. Such assumptions of fact are absolutely erroneous and are simply untrue. The appellate appears to assume that facts were withheld from the Commission, an assumption for which there is no basis whatever.

The analysis of the appellate court concerning damages is also based on the argument that § 4(e) and § 10(e) of the Federal Power Act are applicable. (App. 13a-18a, 28 F.3d at 1549-51). Section 4(e) authorizes the Secretary of the Interior to specify conditions to be included in the license (i.e., Article 33) and § 10(e) authorizes the Commission to fix a reasonable annual charge for use of "tribal lands" in an Indian reservation. The Commission made a finding that the project would not "interfere or be inconsistent with the purposes of any withdrawal of public lands" (App. 61a, Finding

(6)), and the Commission included Article 33. When the license was issued, the project apparently only affected "allotted lands." (App. 53a) There is no showing that the licensed project affected "tribal lands." Allotted lands are subject to condemnation. 25 U.S.C. § 357. Furthermore, whether the lands are allotted or tribally owned, the United States Secretary of the Interior has the authority to issue easements on such lands. 25 U.S.C. § 323.

The appellate court's conclusion that the Commission failed to make the findings required by § 4(e) of the Federal Power Act are without foundation in fact or law. The Commission determined that the Box Canyon Project would affect allotted lands within the Kalispel Indian Reservation. (App. 53a) Thereafter, the Commission made findings that "the issuance of the license ... will not interfere or be inconsistent with the purposes of any withdrawal of public lands... ." (Finding (6), App. 61a) In a similar situation, the Commission issued an order issuing a license with similar determinations to the Department of Water Resources of the State of California, Project No. 2100, 17 FPC 262 (1957). For Project No. 2100, the Commission determined that the project would affect "certain lands held in trust by the United States for Indians." Id. In Finding (8) in the licensing order for Project 2100, the Commission stated "the issuance of a license for the project as hereinafter provided will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands... ." 17 FPC at 265. The 1957 license for Project 2100 also included for the compensation of affected Indians for damage to Indian properties caused by the project and provided that if an agreement could not be reached between the Indians, the State of California, and the Secretary of the Interior, the license would be

required to pay fair market value of the damage as determined by a board of disinterested appraisers selected for that purpose. The 1957 licensing order is quite similar to the 1952 licensing order issued for the Box Canyon Project. The point is that the provisions of the PUD's license were not unusual and appeared to be similar to other licenses issued contemporaneously.

After acknowledging that it would be inappropriate to speculate about the actions that the Commission may have taken under different facts in 1952, and even though the appellate court had no knowledge of the proceedings before the district court since neither the United States nor the Tribe presented any record of such proceedings to the appellate court, the appellate court relied upon a mere argument by the United States concerning current Commission orders and reversed the district court's determination of damages, concluding that powersite value would be more fair. (See App. 17a-18a, 28 F.3d at 1551) The conclusions and statements by the appellate court were made with no record and no support other than arguments made by the United States and the Tribe.

Furthermore, there is no basis for a conclusion that information was withheld from either the Secretary of the Interior or the Commission. See the Orders of the Commission and the 1952 letter from the Acting Secretary of the Interior in the Appendix. The district court made a specific finding that the PUD did not act in bad faith. (App. 39a). Article 33 was included at the request of the Acting Secretary of the Interior. The damages found by the district court were based upon the evidence presented by the United States. (District Court Finding 17, App. 41a, and District

Court Schedule A, App. 45a-46a) It is the United States that elected to pursue damages in the United States District Court by filing its complaint rather than negotiating with the PUD. The district court's findings and judgment were consistent with the prior statements and negotiations between the PUD and the Bureau of Indian Affairs under the Secretary of the Interior. The damages determined by the district court were consistent with compensation that would be appropriate when the PUD exercises its rights of eminent domain under the Federal Power Act and under 25 U.S.C. § 357. The conclusions of the appellate court on damages are without foundation and should be reversed by this Court.

4. United States v. Clarke Should Be Overruled Or Distinguished In This Case.

The appellate court relied, in part, upon the holding in United States v. Clarke to support its conclusion that the PUD trespassed on the Indian lands. (App. 10a, 28 F.3d at 1548) The lands at issue in the case were thought by some, including the State of Washington, to belong to the State as being lands belonging to the bed of a navigable river which were acquired under the equal footing doctrine, the boundary to which was determined by the line of ordinary high water. After the district court determined that the line of ordinary high water was at an elevation substantially lower than the line contended by the State and the PUD, the PUD immediately commenced a condemnation action to obtain the right to overflow such lands. In United States v. Clarke, no such condemnation action was ever commenced. United States v. Clarke, 445 U.S. at 254 (1980).

The district court failed to recognize the authorization established by the licensing orders issued by the FPC and the right of the PUD to condemn Indian lands. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960); Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), and 16 U.S.C. § 814. A contributing factor to the district court's conclusion with respect to trespass was the holding of this Court in United States v. Clarke, 445 U.S. 253 (1980), which reversed the Ninth Circuit Court's decision in United States v. Clarke, 590 F.2d 765 (9th Cir. 1979), and the fact that inverse condemnation is a part of the condemnation law of the State of Washington. Under the law of the State of Washington, the only remedy available to the owner of the property taken by a person having the power of eminent domain is reasonable compensation for the taking or damaging of private property for public use. Brazil v. City of Auburn, 93 Wn.2d 484, 610 P.2d 909, 913, 916 (1980). Under all of the facts and circumstances herein, the principal of inverse condemnation under the law of the State of Washington should be applied to all allotted lands within the Kalispel Indian Reservation as of the time when the taking occurred, since state law is the applicable law under 25 U.S.C. § 357. United States v. Clarke should either be distinguished based upon the facts of this case[7], or United

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[7] The relevant facts of this case include: (1) the PUD's right of eminent domain or for condemnation are based upon a license issued by the Federal Power Commission under the Federal Power Act; (2) the license includes a provision for compensation for the use of Indian lands which was requested by the Acting Secretary of the Interior; (3) the designees of the Secretary of the Interior had previously negotiated with the PUD in good faith and had

(continued...)

States v. Clarke should be overruled as being an inappropriate limitation on the eminent domain rights of persons under state law, particularly where state law authorizes the occupancy of lands subject to the payment of just compensation under the theory of "inverse condemnation." United States v. Clarke could easily be limited to its facts where there was apparently no dispute concerning the ownership of land before the Court and where no condemnation proceeding had been commenced after such land ownership dispute was resolved. However, the better rule would be to reconsider the holding of the Court in United States v. Clarke and to follow the logic expressed by Judge Kennedy in United States v. Clarke, 590 F.2d 765 (9th Cir. 1979).

5. The District Court And The Appellate Court Had Jurisdiction To Determine Title To Property.

It is clear, and it is uncontested, that both the district court and the appellate court had the necessary jurisdiction to determine the property issues (other than the issue of "trespass"). It is undisputed and uncontested that the appellate court and district court had the necessary

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[7](...continued)
approved compensation for the use of Indian lands and had approved overflow easements on Indian lands in the first instance (after the 1952 license was issued) and subsequently, after the 1963 Commission Order was issued, delayed negotiating with the PUD and thereafter commenced litigation against the PUD, claiming trespass; (4) the PUD was always willing and able to pay just compensation for the use and occupancy of Indian lands; (5) after the dispute over the ownership of the lands at issue was resolved, the PUD immediately commenced condemnation proceedings.

jurisdiction to determine the issue of just compensation for the use of Indian lands or the damage to Indian lands. The appellate court should have affirmed the district court except for the determination of trespass and the dismissal of the PUD's condemnation action. Rather than collaterally attacking the licensing orders of the Commission and attacking the integrity of the PUD, the appellate court should have accepted the Commission's licensing orders, upheld the intent of the Commission when such orders were issued, and should have determined the issues that were properly before it.

CONCLUSION

The Petition for Writ of Certiorari should be granted to the appellate court's decision as it relates to trespass, damages, and injunction relief.

RESPECTFULLY SUBMITTED this 13th day of December, 1994.

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Supreme Court, U.S.
FILED

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NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Public Utility District No. 1 of
Pend Oreille County, Washington,

Petitioner,

v.

United States of America, and
Kalispel Tribe of Indians,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellant.	)	No. 88-3617 D.C. No. CV-80-116-JLQ **FILED SEPT. 14, 1994**
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant-Appellant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,	)	No. 88-3618 D.C. No. CV-80-116-JLQ

Defendant-Intervenor.	)
	)
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees,	) No. 88-3619
Plaintiff-Appellant,	)
and	) D.C. No.
KALISPEL INDIAN TRIBE,	) CV-80-116-JLQ
Intervening-Plaintiff,	)
v.	)
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp.,	)
Defendant-Appellee,	)
and	)
DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,	)
Defendant-Intervenor.	)
	)
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees,	) No. 88-3669
Plaintiff,	)
and	) D.C. No.
KALISPEL INDIAN TRIBE,	) CV-80-116-JLQ
Intervening Plaintiff-Appellant,	)
v.	)
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp.,	)
Defendant-Appellee,	)
and	)
DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,	)

Defendant-Intervenor-Appellee.	)	
	)	
UNITED STATES OF AMERICA,	)	No. 92-35504
Plaintiff,	)	
and	)	
KALISPEL INDIAN TRIBE,	)	D.C. No.
Plaintiff-Intervenor-Appellant,	)	CV-80-116-RMB
v.	)	
PEND OREILLE PUBLIC UTILITY	)	
DISTRICT NO. 1, a municipal corp.,	)	
Defendant-Appellee,	)	
and	)	**ORDER**
DEPARTMENT OF NATURAL	)	
RESOURCES, STATE OF	)	
WASHINGTON,	)	
Defendant-Intervenor-Appellee.	)	
	)	

Before: BROWNING, SCHROEDER, and FLETCHER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES of America, as trustee for the
Kalispel Indian Tribe and individual allottees,
Plaintiff-Appellee,
and
Kalispel Indian Tribe, Intervening-Plaintiff,
v.
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corp., Defendant,
and
Department of Natural Resources, State of Washington,
Defendant-Intervenor-Appellant.

UNITED STATES of America, as trustee for the
Kalispel Indian Tribe and individual allottees,
Plaintiff-Appellee,
and
Kalispel Indian Tribe, Intervening-Plaintiff,
v.
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corp., Defendant-Appellant,
and
Department of Natural Resources, State of Washington,
Defendant-Intervenor.

UNITED STATES of America, as trustee for the
Kalispel Indian Tribe and individual allottees,
Plaintiff-Appellant,
and
Kalispel Indian Tribe, Intervening-Plaintiff,
v.
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corp., Defendant-Appellee,
and
Department of Natural Resources, State of Washington,
Defendant-Intervenor.

UNITED STATES of America, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff,

and

Kalispel Indian Tribe, Intervening Plaintiff-Appellant,

v.

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant-Appellee,

and

Department of Natural Resources, State of Washington, Defendant-Intervenor-Appellee.

UNITED STATES of America, Plaintiff,

and

Kalispel Indian Tribe, Plaintiff-Intervenor-Appellant,

v.

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant-Appellee,

and

Department of Natural Resources, State of Washington, Defendant-Intervenor-Appellee.

Nos. 88-3617 through 88-3619, 88-3669, 92-35504.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 12, 1993.

Decided July 14, 1994.

Elizabeth Ann Peterson, U.S. Dept. of Justice, Washington, DC, for plaintiff-appellee-appellant.

Allen H. Sanders, Evergreen Legal Services, Seattle, WA, for plaintiff-intervenor-appellant.

Jerry K. Boyd, Spokane, WA, for defendant-appellant-appellee.

J. Lawrence Coniff, Asst. Atty. Gen., Olympia, WA, for defendant-intervenor-appellant-appellee.

Appeals from the United States District Court for the Eastern District of Washington.

Before: BROWNING, SCHROEDER, and FLETCHER Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

This is the second opinion of this court dealing with issues arising out of a judgment entered by the district court in an action brought by the United States on behalf of the Kalispel Indians against the Public Utility District No. 1 of Pend Oreille County, Washington. The Federal Power Commission issued a license to the Utility to build and operate the Box Canyon Dam on the Pend Oreille River, which forms the western boundary of the Kalispel Indian

Reservation in northeastern Washington.[1] The United States filed suit alleging the Utility had flooded Reservation land and seeking damages and injunctive relief. The Kalispel Indian Tribe and the State of Washington intervened. The Tribe joined the trespass claims advanced by the United States on its behalf. Both the Tribe and the State claimed title to the riverbed.

The district court divided the trial into three phases. In the first two phases, the court considered whether the Utility had flooded Reservation land and whether the Tribe or the State owned the bed of the river. In our first opinion, reported at 926 F.2d 1502, we sustained the district court's holdings that the Utility had trespassed upon the Reservation by raising the level of the river and that the State, rather than the Tribe, owned the bed of the river.

In the final phase of the trial, the district court considered the remedy for the Utility's trespass. On this appeal, the Utility repeats its contention that the district court erred in concluding the Utility had trespassed on Reservation land. The Utility also contends the court erred in dismissing its counterclaim in condemnation against the United States and the Tribe, refusing to grant declaratory relief regarding the calculation of future damages, and awarding prejudgment interest on the damage award. The Tribe and the United States argue the district court erred in failing to include the value of the land as part of the power project in determining the amount of damages, refusing to grant injunctive relief,

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[1] Title to the Reservation, including the land along the river, is held in trust by the United States for the Kalispel Indian Tribe and individual Indian allottees.

and denying the Tribe leave to amend its complaint to allege a claim for water and fishing rights.

We adhere to our determination that the Utility trespassed on the Tribe's lands; we affirm the denial of the Utility's motion for declaratory relief and the Tribe's motion to amend its complaint; and we reverse the damage and prejudgment interest awards and the denial of injunctive relief.

I. LIABILITY FOR TRESPASS

The Utility argues there was no trespass because Article 33 of the project license authorizes the Utility to flood Reservation land and compensate the Tribe at the rate the Utility pays private land owners--the rental value of the land as grazing land. It is too late for the Utility to challenge the existence of a trespass. That question was resolved against its position by the district court, and we affirmed the district court's conclusion in our first opinion. During phase three of the trial, the district court found the Utility knew it had no right to flood Reservation land, but flooded it anyway, a finding supported by substantial evidence.[2]

In any event, the Utility's interpretation of Article 33 is without merit. The language of Article 33 neither authorizes the Utility to flood Reservation land, nor specifies the amount of damages the Utility would owe the Kalispel Indians if it did. The first clause requires the Utility to

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[2] The Utility obtained easements to flood land neighboring the Reservation. It flooded the land at issue here only after the Kalispel Indians refused to grant similar easements.

operate the Dam in such "a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation."[3] The second clause provides an administrative procedure for compensating the Indians if the Utility breaches the prohibition against flooding Reservation land: "[I]n the case such damage should occur as a result of the operation of the project, the Indians shall be compensated in the manner and amount as determined by the Secretary, after consultation with the [K]alispel Indian Community Council and Licensee." Nothing indicates creation of this administrative remedy was intended to affect the rights of the Tribe and the United States if they choose instead to file a trespass action in federal court, as they did.

If read as the Utility suggests, Article 33 would authorize the taking of Reservation land by inverse condemnation in violation of federal law and the use of such land in a manner contrary to the provisions of the Federal Power Act. The Utility may not condemn tribal lands embraced in a reservation under the Power Act or any other federal statute, Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 786 n. 29, 104 S.Ct. 2105, 2117 n. 29, 80 L.Ed.2d 753 (1984); FPC v. Tuscarora

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[3] In a letter to the Commission proposing Article 33, the Secretary of the Interior explained the purpose of the provision:

> "Indian lands and interests on the Reservation will not be adversely affected if backwater from the dam is not allowed to raise the water- surface levels adjacent to Indian lands during flood flows. The spillway gates at Box Canyon should be so operated that the maximum river water surface elevations adjacent to Indian lands will not damage those lands."

Indian Nation, 362 U.S. 99, 113-14, 80 S.Ct. 543, 551-52, 4 L.Ed.2d 584 (1960), and may not take the land of individual Indian allottees through inverse condemnation, United States v. Clarke, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980). Section § 4(e) of the Power Act prohibits the use of reservation lands for power production unless the Commission finds "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" and the Secretary of the Interior imposes "such conditions as the Secretary ... shall deem necessary for the adequate protection and utilization of such reservation." 16 U.S.C. § 797(e). Section 10(e)(1) of the Power Act prohibits the use of tribal lands embraced within a reservation unless the Commission fixes a "reasonable annual charge" for the use of the lands and the Indian tribe approves the charge. 16 U.S.C. § 803(e)(1). None of these conditions were met. Neither the Commission nor the Secretary approved the flooding of the Reservation; the Commission did not find the Reservation could be flooded without interfering with the purpose for which the Reservation was created; the Secretary did not determine what conditions might be necessary for the protection and utilization of the Reservation; the Commission did not fix an annual charge for use of Reservation land, and the Tribe was not asked to approve such a charge.

These omissions apparently resulted from the failure of the Utility to disclose that Reservation land would be flooded by the project. The application and the license itself indicated the project would be so constructed and maintained that the Reservation would not be affected. The license stated the water level would be higher in normal flows "for possibly 24 miles upstream." The reservation is located 30

miles upstream. The license also incorporated a map locating the project boundary six miles downstream from the Reservation.[4]

Based on the language of Article 33, the statutory scheme governing the use of Indian reservation lands, and the other evidence in the record, we conclude the project was to be operated in such a way as not to flood Reservation land, and that Article 33 was intended to reinforce that prohibition and provide a remedy for its violation, rather than to confer blanket authority upon the Utility to trespass on Reservation land.[5]

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[4] The Utility notes that its license was amended in 1961 to allow it to raise the backwater at the Albeni Falls Dam upstream from the Reservation by an amount that would result in flooding Reservation lands adjacent to the river. The amendment, however, could not authorize the Utility to flood Reservation land. As noted in the text, the Utility could not use such land for the project unless the Secretary and the Commission authorized the use under § 4(e) and § 10(e) of the Power Act. Moreover, the 1961 amendment provided: "It is not necessary to extend the existing Project Boundary further upstream because of the fact that the limitation of not exceeding the natural elevation at Cusick for 90,000 cfs flow [as proposed by the Amendment] does not change the maximum effect of the back- water upstream of the Project Boundary."

[5] The Utility's fall-back position is that if trespass occurred, damages are to be determined in accordance with state law pursuant to 16 U.S.C. § 814 of the Power Act. That section applies to the exercise by a licensee of the power of

(continued...)

II. DAMAGES

A. Primary Jurisdiction.

The Tribe contends the Secretary of the Interior has primary jurisdiction to determine questions relating to damage to Reservation land due to operation of the Dam by virtue of Article 33 of the license[6], and asks that these proceedings be stayed to allow the Secretary to exercise that jurisdiction.[7] The doctrine of primary jurisdiction is

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[5](...continued)
eminent domain to acquire private lands for a power project. No such proceeding was or could have been utilized here to acquire the use of tribal lands on the Reservation. Escondido, 466 U.S. at 786 n. 29, 104 S.Ct. at 2117 n. 29; Tuscarora, 362 U.S. at 113-14, 80 S.Ct. at 551-52.

[6] Article 33 provides in full: The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Calispel [sic] Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel [sic] Indian Community Council and the Licensee.

[7] The Tribe seeks to supplement the record on appeal with evidence that it has initiated Article 33 proceedings before the Secretary. Federal Rule of Appellate Procedure 10(e) allows addition of anything "omitted from the record by error or accident." The evidence offered by the Tribe does not fall in this category.

inapplicable. The Secretary's authority to pass on damage issues arises from Article 33 of the project license, not from a grant of jurisdiction by Congress pursuant to a comprehensive regulatory scheme. United States v. General Dynamics Corp., 828 F.2d 1356, 1362-66 (9th Cir.1987). Congress authorized the Secretary to impose conditions in a project license "necessary for the adequate protection and utilization of [a] reservation," 16 U.S.C. § 797(e), but Congress neither required the Secretary to include Article 33 in the license nor placed the damage issue "within the special competence of an administrative body" under "a regulatory scheme." United States v. Western Pac. R.R., 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956).

B. Standard for Determining Damages.

The district court concluded the Utility flooded approximately 186.7 acres of Reservation land for 30 years without an easement or court order, and awarded damages totalling $46,231. The court apparently concluded Washington law controlled and under that law the Tribe was entitled to recover only the rental value of the land for grazing.

The Tribe and the United States argue damages for trespass on Indian lands are controlled by federal law and the damage award was inadequate under federal law because it did not reflect the value of the land as a part of the Box Canyon Dam project.[8] They reason that if inclusion of

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[8] The Utility does not dispute that federal law controls an action for trespass on Indian land. See County of Oneida v.

(continued...)

tribal lands within the Reservation had been anticipated, the Commission, in compliance with § 10(e) of the Power Act, would have included in the project license a provision fixing an annual charge for use of the lands and the annual charge would have been calculated on the basis of the value of the use of the land as part of the project. Since operation of the project in fact affected such lands, and since the Utility circumvented the provisions of § 4(e) and § 10(e) and preempted the fixing of an annual charge by flooding the lands without first securing a license to do so, the Tribe and the United States reason the Utility must pay the Tribe what

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*(...continued)

Oneida Indian Nation, 470 U.S. 226, 234, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985) (right of Indians to occupy lands held in trust by the United States for their use is "the exclusive province of federal law"). The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages. See, e.g., Marsh v. Brooks, 49 U.S. (8 How.) 223, 232, 12 L.Ed. 1056 (1850) (action for ejectment); United States v. Santa Fe Pacific R.R., 314 U.S. 339, 359, 62 S.Ct. 248, 257-58, 86 L.Ed. 260 (1941) (action for accounting); County of Oneida, 470 U.S. at 233- 36, 105 S.Ct. at 1250-52 (action for damages); United States v. Southern Pacific Transp. Co., 543 F.2d 676, 682-84 (9th Cir.1976) (action for damages). The federal interest in protecting the rights of Indians to occupy their lands is also expressed in the Federal Power Act which creates a specific statutory scheme governing the use of tribal lands embraced within Indian reservations. Tuscarora, 362 U.S. at 118, 80 S.Ct. at 554-55.

the Tribe lost--the annual charge that would have been imposed if § 10(e) procedures had been implemented.

Whether the Commission would have determined the annual charge for use of tribal lands on this basis when the Utility's license was issued in 1952 is a matter of conjecture. Clearly § 10(e) did not require the Commission to do so. The Commission's discretion in determining appropriate annual charges was limited only by the requirement that the charges be "reasonable." City of Vanceburg v. FERC, 571 F.2d 630, 647 (D.C.Cir.1977) ("[T]he Commission has a discretion within the statute in fixing 'reasonable annual charges', and thus conceivably might use any one of several methods in calculating the charge...."); Montana Power Co. v. FPC, 298 F.2d 335, 340 (D.C.Cir.1962) (holding that the only question is "whether the end result is a reasonable one as the statute requires it to be").

In 1952, the regulations implementing § 10(e) specified the annual charge for use of government lands "will be based on the estimated value for power purposes." As to tribal lands, however, the regulations provided only that the Commission should determine the annual charge "on a case-by-case basis under § 10(e) of the Federal Power Act."[9]

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[9] 18 C.F.R. § 11.22 (1938) read: Use of Government dams, structures, tribal lands. Reasonable annual charges for recompensing the United States for the use of Government dams ..., and for the use, occupancy, and enjoyment of the lands of the United States adjoining or pertaining thereto, will be based upon the estimated value for power purposes of the properties and privileges for which a license is issued: Provided,

(continued...)

The Commission considered adopting a general rule for determining annual charges for a licensee's use of tribal lands, but declined to do so, preferring instead to set annual charges according to the facts of each case. Escondido Mut. Water Co., FERC Opinion No. 36-A, 6 F.E.R.C. (CCH) P 61,189 (1979).[10]

The Tribe and the United States cite several cases for the proposition that under the regulations applicable in 1952, the annual charge fixed by the Commission for the use of tribal lands within the Reservation would have included the power site or shared benefits value of the land. In each of the cases cited, however, the license itself specified the charge fixed should be based "upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." Montana Power Co. v. FPC, 459 F.2d 863, 869 (D.C.Cir.1972); Confederated Salish and Kootenai Tribes v. United States,

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*(...continued)

however, That annual charges ... for use of tribal lands embraced within Indian reservations shall be determined in accordance with the provisions of section 10(e) of the Federal Power Act.

[10] The Commission stated: The Federal Power Act ... is silent as to how annual charges shall be computed.... We considered fixing the annual charges herein on the basis of the most profitable use of the tribal lands involved herein, as Interior advocates. But since we are not bound to fix [annual charges] in any particular manner, and since we are not bound to fix them in the same manner in every case, we have decided that the net benefits method is more appropriate in this instance.

181 Ct.Cl. 739, 747, (1967); see also Escondido Mut. Water Co. v. FERC, 692 F.2d 1223, 1228 (9th Cir.1982), amended, 701 F.2d 826 (9th Cir.1983), rev'd in part, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984). Moreover, the language of the licenses at issue in Montana Power and Confederated Salish was taken directly from Commission regulation 14, section 5, which was superseded in 1938, before the license for the Box Canyon Dam project was issued.[11]

Although use of the value of the tribal lands as part of the power project in calculating the annual charge is not compelled by regulation or case law, we nevertheless conclude it is the most acceptable measure of damages for the Utility's trespass. As noted, the power site formula was reflected in the governing regulation prior to 1938, and the United States has advised the court this is the formulation now applied by the Commission in fixing annual charges for use of tribal lands on all power projects. Its use will also assure the Tribe will not suffer an uncompensated loss from the Utility's past failure to comply with the Power Act and will encourage future compliance.

The damage calculation urged by the Utility would encourage others to use Indian reservation lands for power

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[11] Regulation 14, section 5, read: When licenses are issued involving the use of tribal lands embraced within Indian reservations the commission will fix a reasonable annual charge for the use thereof, based upon the commercial value of the land for the most profitable purpose for which suitable, including power development. The charge shall commence upon date license is issued. FPC Rules and Regulations 33 (1921).

production without complying with the Power Act. Applicants for licenses would be motivated to deny or minimize the anticipated effect of their project on Indian reservation lands (as the Utility did in this case) to avoid the risk that the Secretary and Commission might deny them use of the lands under § 4(e), or the Commission might require them to pay annual charges that included the power site value of the tribal lands under § 10(e). The Secretary and Commission cannot fulfill their respective obligations under § 4(e) and § 10(e) when applicants for Power Act licenses deny or understate the effect their projects will have on Indian reservation lands, or do not seek approval to use Indian reservation lands after they discover their projects include such lands.[12] Moreover, circumventing the Act would deprive the Indians of their right, granted under § 4(e) and § 10(e), to influence the terms upon which the licensee uses reservation land. Requiring the Utility to reimburse the Tribe for the most profitable use of its land will encourage future applicants for licenses to fully disclose the effect of their projects on Indian reservation lands and current licensees to seek approval to use such lands from the Secretary and Commission.

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[12] A Power Act license may be amended to include Indian reservation lands. 16 U.S.C. § 803(b) (requires FERC approval for alterations to project); 18 C.F.R. § 4.200 (provides procedures for amending license). See, e.g., Lac Courte Oreilles Band v. FPC, 510 F.2d 198, 200 n. 4 (D.C.Cir.1975).

III. PROSPECTIVE RELIEF

A. Injunctive Relief.

The Tribe and the United States sought an injunction against future flooding of Reservation land. The district court denied relief on the ground the Indians would be fully compensated in a condemnation proceeding the Utility had filed to condemn a permanent flowage easement.[13]

The district court's ruling rested on an erroneous legal premise. Congress has the exclusive right to extinguish Indian title to lands, United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347, 62 S.Ct. 248, 252, 86 L.Ed. 260 (1941), and has not authorized condemnation of land held in trust by the United States for the benefit of the Tribe. A licensee cannot condemn tribal lands under § 21 of the Power Act, 16 U.S.C. § 814, but must obtain Commission authorization to use such lands under § 4(e) and § 10(e) of the Power Act. Escondido, 466 U.S. at 786 n. 29, 104 S.Ct. at 2117 n. 29; Tuscarora, 362 U.S. at 113-14, 80 S.Ct. at 551-52.

The Utility may be able to condemn land held in trust by the United States for the benefit of individual Indian allottees

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[13] The Utility filed a counterclaim for condemnation in this action and initiated a separate condemnation proceeding, but the latter was stayed pending the outcome of this case, and (as discussed below) the former was dismissed for failure to serve the individual allottees.

under 25 U.S.C. § 357,[14] but this statute does not apply to land held in trust for the Tribe. Nebraska Public Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 961 (8th Cir.1983). Even if the Utility could condemn land held in trust for individual allottees, it could not occupy such land until it obtained judgment through a condemnation proceeding, Clarke, 445 U.S. 253, 100 S.Ct. 1127 (25 U.S.C. § 357 does not authorize inverse condemnation), which it has not done. In addition, since a significant portion of the land along the river is held in trust for the Tribe and would be flooded if the Utility flooded the land held in trust for individual allottees, the Utility could not raise the level of the river without violating the rights of the Tribe.

On remand, the district court should consider whether to issue an injunction in light of the correct legal principles and the Utility's and State's assertion that a large part of the Pacific Northwest would suffer a power shortage if the Utility were enjoined from flooding the land in question. If the district court decides to enjoin the flooding, it could fashion a remedy to minimize the harm such an injunction might cause. The court could, for example, enjoin the Utility from occupying Reservation land but stay the order to

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[14] This statute provides: Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee. 25 U.S.C. § 357.

permit the Utility to seek an amendment to its license and satisfy the Power Act, especially § 4(e) and § 10(e).[15]

B. Declaratory Relief.

Since the Box Canyon Dam license does not authorize the Utility to flood Reservation land, the district court acted in its discretion in refusing to grant declaratory relief regarding the calculation of future damages.

IV. DENIAL OF TRIBE'S MOTION TO AMEND

Twenty four days before trial of the third phase was to begin, the Tribe sought leave to amend its complaint in intervention to allege a claim for water and fishing rights under Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). The district court denied the motion as untimely. We reversed because the district court had relied solely upon the Tribe's delay in bringing the motion without considering whether the opposing parties had been prejudiced. United States v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502, 1511-12 (9th Cir.1991). On remand, the district court found the delay had been unduly long and that the Utility would be prejudiced if the motion were granted. Fed.R.Civ.P. 15(a); Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 538 (9th Cir.1989) ("In deciding whether justice requires granting leave to amend, factors to be considered include the presence or absence of undue delay ... [and] undue prejudice to the opposing party....").

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[15] Presumably, such a stay would require the Utility to post a bond as security for the rights of the Tribe and the United States.

The Tribe's delay was extreme and unexplained. The legal basis for the claim had existed since 1908. The United States filed the action in March of 1980. The Tribe intervened in August of 1982. The Tribe moved to add the Winters claim seven years after the case began, five years after leave to intervene was granted, eleven months after the district court entered judgment against the Tribe in the second phase, approximately a month after the close of discovery in the third phase, and twenty-four days before the commencement of the third phase trial. The Tribe offered no explanation for the delay.

Prejudice to the Utility would have been substantial. The Tribe had alleged ownership of the beds and shores of the river but not of the water or fish. The extensive discovery undertaken prior to the second phase trial did not consider reserved water and fishing rights. Completed depositions would have to be retaken, new depositions of yet-to-be retained experts would have to be scheduled, and new state agencies would have to be brought into the action with new attorneys to represent the interests of those agencies.[16] Trial of the third phase would have been substantially delayed.

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[16] The Department of Natural Resources, which has authority over aquatic lands acquired by the State, is the only state agency named as a defendant in this action. The Department of Wildlife has authority over game and fish, and the Department of Ecology has authority over water. The district court found each agency was represented by a different division within the Washington State Attorney General's office.

The district court's findings regarding undue delay and prejudice are not clearly erroneous and amply justify denial of the motion to amend. See Western Shoshone Nat'l Council v. Molini, 951 F.2d 200, 204 (9th Cir.1991); Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir.1990); M/V American Queen v. San Diego Marine Const., 708 F.2d 1483, 1492 (9th Cir.1983).

V. DISMISSAL OF UTILITY'S COUNTERCLAIM

The district court allowed the Utility to amend its answer to include a counterclaim in condemnation. The counterclaim was served on the attorneys for the United States and the Tribe. The court dismissed the claim for failure to serve the individual Indian allottees of the land the Utility sought to condemn. The Utility contends dismissal was improper because the United States represented both the Tribe and the allottees. We agree. When a party is represented by an attorney, service on that attorney is proper service. Fed.R.Civ.P. 5(b). The United States has discretion to represent the individual Indian allottees under 25 U.S.C. § 175. Siniscal v. United States, 208 F.2d 406, 410 (9th Cir.1953). The record establishes the United States and the Tribe represented all the Indian landowners in the case.[17]

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[17] The United States' complaint reads: This is a civil action brought by the United States of America in its sovereign capacity and as trustee on behalf of the Kalispel Indian Tribe (aka Kalispel Indian Community) and individual Kalispel allottee[s] holding beneficial interest in allotte[d] trust lands flooded by the Pend Oreille County Public Utility District No. 1. The Tribe's petition to intervene states: "Each Indian owner

(continued...)

On remand, the district court should consider whether the Utility can state a claim for condemnation.[18]

VI. PREJUDGMENT INTEREST

The Utility argues the district court erred in awarding pre-judgement interest. The district court awarded prejudgment interest pursuant to state law, presumably because it calculated damages pursuant to state law. Since this case arises under federal law, the district court should apply federal pre-judgment interest principles. Home Savings Bank, F.S.B. v. Gillam, 952 F.2d 1152, 1161 (9th Cir.1991) ("The award of pre-judgement interest in a case arising under federal law rests within the sound discretion of the court."); Board of County Commissioners v. United States, 308 U.S. 343, 352, 60 S.Ct. 285, 289, 84 L.Ed. 313 (1939) ("The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable."). On remand, the district court should determine under federal law whether prejudgment interest is appropriate and the appropriate amount.

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[17](...continued)
of lands affected by this law suit has signed a written authorization requesting and authorizing the United States and the Tribe to continue the foregoing case on his or her behalf."

[18] As noted above, the Utility cannot condemn the land held in trust for the Tribe, and it cannot condemn the land held in trust for the individual allottees without affecting the Tribe's land.

VII. CONCLUSION

We reverse the district court's damage award and remand for recalculation according to the most profitable use of the flooded Reservation land. On remand, the district court may consider whether this is an appropriate case for prejudgment interest under federal law. We also reverse the district court's order denying an injunction and dismissing the Utility's counterclaim in condemnation. We affirm the denial of the Utility's motion for declaratory relief and the Tribe's motion to amend its complaint to add a Winters claim.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellant.	)	No. 88-3617 **FILED MAY 26, 1988**
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellant, and	)	No. 88-3618

DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellant, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellee, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	No. 88-3619
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff, and KALISPEL INDIAN TRIBE, Intervening Plaintiff-Appellant, v.	)	No. 88-3669

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation,
Defendant-Appellee,
and
DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor-Appellee.

On May 23, 1988, a Prebriefing Conference was held before Conference Attorney Meredith J. Watts. Kalispel Indian Tribe was represented by Robert D. Dellwo. Pend Oreille County P.U.D. #1 was represented by Jerry Boyd and Diane Hermanson. United States was represented by Elizabeth Ann Peterson. State of Washington was represented by Lawrence Coniff.

(1) Appellants shall file a brief on the ordinary high water mark issue by October 3, 1988.

(2) Appellee shall file an answering brief on or before November 7, 1988.

(3) Appellants may file a reply brief within 21 days of the service date of appellees' brief.

Appellants shall file their opening brief on the issue of aboriginal title to the stream bed within 30 days of the filing of the reply brief on the water mark issue. Further briefing shall be set by conference.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/
Meredith J. Watts
Conference Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellant.	)	No. 88-3617 D.C. No. CV-80-116-JLQ Western Washington (Spokane) **FILED JULY 3, 1989**
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellant, and	)	No. 88-3618 D.C. No. CV-80-116-JLQ Western Washington (Spokane)

DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellant, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellee, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	No. 88-3619 D.C. No. CV-80-116-JLQ Western Washington (Spokane)
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff, and KALISPEL INDIAN TRIBE, Intervening Plaintiff-Appellant, v.	)	No. 88-3669 D.C. No. CV-80-116-JLQ Western Washington (Spokane)

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellee, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellee.	)	**ORDER**

On June 2, 1989, a prebriefing conference was held before Conference Attorney Meredith J. Watts. Kalispel Indian Tribe was represented by Robert D. Dellwo. Pend Oreille County and P.U.D. #1 were represented by Jerry Boyd and Diane Hermanson. The United States was represented by Elizabeth Ann Peterson. The State of Washington was represented by Lawrence Coniff.

The parties have determined to file a stipulated motion to have the court hear and decide the legal issues brief in Phases I and II before briefing is ordered for Phase III. The conference attorney recommends that the court grant the motion in the interests of judicial economy and efficiency.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/
Meredith J. Watts
Conference Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, and KALISPEL INDIAN TRIBE, Plaintiff/Intervenor, vs. PEND OREILLE COUNTY PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant/Intervenor.	)	No. C 80-116 RMB FINDINGS OF FACT AND CONCLUSIONS OF LAW and JUDGMENT **FILED AUGUST 10, 1987**

FINDINGS OF FACT

1. The United States Federal Power Commission Order issued a license to The Public Utility District #1, Pend Oreille County, on February 5, 1952 to operate the Box Canyon Dam on the Pend Oreille River. Number 7 on Page 5 of the license, under the heading in which the Power Commission notes several factors when considering the protests to the Box Canyon Project, reads as follows:

> The proposed plan of operation for the project contemplates that from about July to mid-September the tentative reservoir operating schedule will result

> in minimum flooding effects on existing productive wild hay lands and that during the ensuing non-growing winter and early spring months operation involving one foot of backwater effect at Albeni Falls will prevail for flows up to 90,000 c.f.s. operation during the spring and summer flood period may be available but will be such as not to augment either local flooding within the diked areas or the natural hazards of overtapping any of the main dikes along the river.

Defendant's Exhibit 2000.

Article 33 on page 8 of the license reads as follows:

> The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land or the Calispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel Indian Community Council and the Licensee.

Defendant's Exhibit 2000.

2. The Harza Engineering Company's "Project Planning Report for the Box Canyon Project" (The Harza Report), dated October 1951, described the study of the feasibility and specifications of the Box Canyon Project. (Exhibit 201). In the Summary of the Harza Report, the Company projected the average flow at about 25, 900 c.f.s.

> Power and energy capabilities [were] based on the assumption that the headwaters of the Box Canyon Project will encroach, at times, about one foot on the tailwater at Albeni Falls. ...The governing criteria for spillway discharge capacity is the ability to pass all expected flood flows without backwater effects.

Exhibit 201A.

The Tabulation of Significant Data appended to the Summary indicates that the net head for turbine rating was 41 feet and the maximum operating head was 48 feet. Id. Again, Plate 18 in the Harza Report indicates that with one foot of backwater at Albeni Falls and a head of 41 feet the flow would approximate 25,900 c.f.s. Plate 17 indicates that with a flow of 25,900 c.f.s. an approximate water level at Cusick of between 2031.5 and 2032.0 feet would result.

3. In a letter dated February 9, 1955, Superintendent Elmo Miller of the Northern Idaho Indian Agency, Bureau of Indian Affairs (Northern Idaho Indian Agency), referring to a memorandum from the acting head of the federal land office, states that it appears

> that the various allottees and Kalispel tribe would be entitled to payment for all the damages on the property owned by them that will be affected by the Box Canyon Dam.

Defendant's Exhibit 2008 (Letter from Elmo Miller to the Public Utility District No. 1 (Feb. 9, 1955).

4. In a letter dated January 22, 1954, Superintendent M.L. Robertson of the Northern Idaho Indian Agency returned an approved warranty deed form to be used in securing flowage easement on the Kalispel Reservation. Defendant's Exhibit 2053 (Letter from M.L. Robertson to Public Utility District No. 1 (Jan. 22, 1954)).

5. In 1954 the PUD acquired easements to various parcels on the Kalispel Reservation. These warranty deeds granting the easements were signed in March, September, and October of 1954. Each warranty deed contained a recital that stated that the easement was to property

> lying below 2031.3 feet above mean sea level ...[and d]uring the haying season which is approximately July 1 to September 15 of each year, whenever Albeni Falls is releasing not more than 20,000 c.f.s. of water, Box Canyon gates will be operated so that the level of water at the Cusick gauging station will not exceed elevation 2028 feet above mean sea level...

Defendant's Exhibit 2055 (Warranty deeds granting the PUD easements on the Kalispel Indian Reservation (1954)). See Findings of Fact and Conclusions of Law, Kalispel v. PUD #1, Fact 36 (Aug. 26, 1983).

6. The approved blueprint of the estimated damages below mean high water prepared for the Box Canyon Project in 1951 indicates that the estimated damage level was 2031+ feet. H.A. Sewell prepared this document. Defendant's Exhibit 2012 (Blueprint of the estimated damages below mean high water caused by the Box Canyon Project prepared

by H.A. Sewell for the PUD (prepared May 23, 1953 and attested to by Sewell October 6, 1954)).

7. In a document he prepared, dated May 29, 1987, and in his June 3, 1987 testimony H.A. Sewell calculated the Indian Land between elevations 2028 feet and 2035 feet to be 186.07 acres. He determined that the Kalispel land presently under easement totalled 33.86 acres (allotments 18, 31, 83, 86, and 105 were already subject to easements up through a height of 2031.3 feet. Plaintiff's Exhibit 1004). Comparing these numbers Sewell determined that the Indian lands without easement totalled 152.10 acres. Plaintiffs stipulated to these acreage figures.

8. PUD Resolution NO. 544 amended the license to increase the maximum allowable backwater at the Albeni Falls Power Plant from 1.0 to 2.0 feet. The PUD knew that to achieve a head of 41 feet with 2.0 feet of backwater at Albeni Dam it would require a flow of in and around 30,000 c.f.s. See the Harza Report, Plate 18. With a 2.0 feet backwater at Albeni Falls, such a flow would result in a water level of approximately 2034 feet at Cusick. See Plaintiff's Exhibit 1013 (Volpe Report on Box Canyon Project Data. Table 1 lists Cusick elevations for various flows with 2.0 feet of backwater at Albeni Falls.).

9. The PUD knew it was exceeding any easements it had to flood land on the Kalispel Indian Reservation.

> Our District operating levels of the Box Canyon Dam, for the past several years during the winter seasons, have been near the 2033 level. This is nearly 8 feet below the mean high water levels of

> the Pend Oreille River, yet it is some 2 feet above the present easement obtained by our District. We are presently planning to obtain easement to an elevation of 2035.5 in the area.

Letter from Albert T. Strayer of the PUD to Vincent Little, Acting Superintendent Northern Idaho Agency (Oct. 25, 1967).

The PUD partially completed the process of securing easement from the various landowners. See

a. Defendant's Exhibit 2020 (list of property owners);

b. Defendant's Exhibit 2057 (Memorandum from C.G. Birdshead, Supervising Real Property Management Officer of the Northern Idaho Agency, to William E. Ensor, Jr. Superintendent of the Northern Idaho Agency (Oct. 16, 1963) (outlining discussion with William Strayer and Mr. Beasley of the PUD regarding additional easements up to elevation 2035.5 feet));

c. Defendant's Exhibit 2021 (Letter from Albert T. Strayer to William E. Ensor, Jr., Northern Idaho Agency (Nov. 27, 1963) (submitting form of easement for agency approval));

d. Defendant's Exhibit 2022 (Blueprint prepared by H.A. Sewell for the PUD showing present and planned easements) (Prepared Nov. 29, 1963 and certified Dec. 2, 1963));

e. Defendant's Exhibit 2028 (Letter from Bill Bryan, Acting Superintendent of the Northern Idaho Agency to the PUD (Aug. 9, 1966) (request for a map showing additional allotments and request for a schedule of damages to facilitate approval of the easement form and the appraisal));

f. Defendant's Exhibit 2030 (Letter from Bill Bryan, Acting Superintendent of the Northern Idaho Agency to Albert T. Strayer, Auditor and Land Rights Agent for the PUD (Oct. 19, 1966) (approval of the forms of the deeds of trust for the flowage easement with several minor changes));

g. Defendant's Exhibit 2031 (Letter from Albert T. Strayer to Bill Bryan (Oct. 31, 1966) (indicating will proceed to secure easement approvals));

h. Defendant's Exhibit 2033 (Letter from Albert T. Strayer to Vincent Little, Acting Superintendent of the Northern Idaho Agency (Oct. 25, 1967) (proposed invitation for leasing includes lands that are affected by higher PUD water levels)); and

i. Defendant's Exhibit 2036 (Letter from Vincent Little to Albert T. Strayer (Oct. 7, 1968) (tribal council will meet to discuss leasing and trespassing)).

The PUD's attempts at securing easements, and delays by the Indians and the government in processing or finalizing the agreements, demonstrates that the PUD did not act in bad faith.

10. The PUD did obtain easements from all landowners but the Indians. When the easements were never finalized

the PUD went ahead and raised the backwater at the Albeni Falls Dam, from 1.0 foot to 2.0 feet.

11. The Court has already determined that the ordinary high water line is 2034 feet at the Cusick gauge. Kalispel vs. Public Utility District No. 1, CIV-80-116, Conclusions of Law #1 (Aug. 26, 1983).

12. The existing easements executed in 1954 allowed the flooding of Kalispel Indian land up to 2031.3 feet at the Cusick gauge except during July 1st through September 15th of each year, when the easement could not exceed 2038 feet at the Cusick gauge.

13. Water levels regularly exceeded the 2038 feet level at Cusick gauge between July 1st and September 15th. The following examples are typical of the years since the Box Canyon Dam began operating. During the water year 1953-1954 the water level exceeded 2028 feet at the Cusick gauge 29 times between July 1st and September 15th. In the water year 1963-1964 the water level exceeded 2028 feet at the Cusick gauge 77 times (every day) between July 1st and September 15th. In the water year 1973-1974 the water level exceeded 2028 feet at the Cusick gauge 77 times (every day) between July 1st and September 15th. As a final example, in the water year 1983-1984 the water level exceeded 2028 feet at the Cusick gauge 77 times (every day) between July 1st and September 15th.

14. Throughout the years water levels at the Cusick gauge regularly exceeded 2034 feet. The following examples are typical of the years since the Box Canyon Dam began operating. In the water year 1953-1954 the water level at the

Cusick gauge exceeded 2034 feet 67 times. In the water year 1963-1964 the water level at Cusick exceeded 2034 feet 72 times. In the water year 1973-1974 the water level exceeded 2034 at Cusick 101 times. In the water year 1983-1984 the water level at Cusick exceeded 2034 feet 93 times.

15. Plaintiff has suffered no irreparable injury for 2 reasons:

a. The tribe and individual allottees can be compensated fairly for the use of their land; and

b. The PUD has filed a condemnation action seeking a permanent flowage easement.

16. The granting of any injunctive relief would cause greater harm to the Defendant PUD. Furthermore, this conduct, though unlawful, was in part a product of inaction on the part of the Plaintiff, Tribe, and individual allottees. This inaction would have lead a reasonable person to believe the easement sought would be granted.

17. The damages as set forth in Schedule A are determined by multiplying the acreage (stipulated to be 186.07) by the AUM (animal unit month) for each year (AUMs used range from 1-9.50) times the AUM per acre (1.8). The acreage amount was stipulated to be counsel, the AUM is derived from Plaintiff's Exhibit 1011, and the AUM per acre is taken from the testimony of Dennis Olson.

CONCLUSIONS OF LAW

1. Flooding of lands without obtaining easements from Indians or an appropriate court order allowing such flooding constitutes a trespass. In the State of Washington, where a municipality has damaged land for public purposes, such as in this case, the only remedy authorized under state law is just compensation for such taking. Brazil v. City of Auburn, 93 Wn.2d 484, 610 P.2d 909, 913, 916-16 [sic] (1980). The PUD has committed a trespass. Findings of Fact and Conclusions of Law, Kalispel, Conclusion #5. The flooding of the land above a height of 2028 feet at Cusick repeatedly between July 1st and September 15th of each year constitutes a trespass to the land presently under easement (33.86 acres) between heights 2028 and 2031.3. The flooding of the land under easement above 2031.3 feet at Cusick and the flooding of the remaining land between 2028 and 2034 (152.10 acres) constitutes a trespass. The PUD has trespassed on a total of 186.07 acres of the Kalispel Indian Tribe and individual Indian allottees.

2. Damages awarded are for the use of the property and do not constitute any award for a permanent taking of the property. See Auburn, 93 Wn. 484, 610 P.2d 909.

3. This is a proper case for the award of interest under Washington law. Prejudgment interest is an element of complete compensation. See, e.g. General Motors Corp. v. Devex Corp.. 461 U.S. 648, 655-56, 103 S.Ct. 2062-63 (1983). "The cases teach us that interest is not recoverable according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be

inequitable." Board of Com'rs of Jackson County v. United States, 308 U.S. 343, 352, 60 S.Ct. 285, 289 (1939). "With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See Brown v. United States, 263 U.S. 78; Seaboard Airline Co. v. United States, 261 U.S. 299." Board of Comm'rs v. United States, 308 U.S. 343, 351-352, 60 S.Ct. 285, 288-89 (1939). Here the award of interest to the Indian Tribe for damages caused by a trespass is not inconsistent with federal policy. Under Washington law prejudgment interest is allowable if the damage amount is liquidated or unliquidated and determinable by computation with reference to a fixed standard. See Elte, Inc. v. S.S. Mullen, Inc., 469 F.2d 1127 (9th Cir. 1972). The AUM measurement is an accepted standard and is readily ascertainable. The Court will award interest.

4. Interest was determined on an annual rate of 6%.

5. The total damage award of $72,465.78 shall bear interest at the legal rate from date of judgment.

6. The Plaintiffs shall recover their costs.

7. The request for injunctive relief is denied.

JUDGMENT

IT IS ORDERED that judgment is entered in favor of the Plaintiff United States as trustee for the Kalispel Indian Tribe and individual allottees in the amount of $72,465.78 against the Public Utility District #1 together with interest thereon from date of judgment and Plaintiff's costs incurred.

DATED this 6th day of August, 1987.

/s/
RICHARD M. BILBY,
United States District Judge

SCHEDULE A

YEAR	ACREAGE[1]	AUM[2]	AUM/ACRE[3]	GRAZ. VAL.[4]	INTxYRS.[4]	TOTAL
1956	186.07	1.00	1.8	$251.00	15.06x30	=$451.80
1957	186.07	1.08	1.8	$363.66	21.82x29	=$632.77
1958	186.07	1.16	1.8	$388.51	23.31x28	=$652.70
1959	186.07	1.24	1.8	$415.30	24.92x27	=$672.84
1960	186.07	1.33	1.8	$445.45	26.73x26	=$694.90
1961	186.07	1.42	1.8	$475.59	28.53x25	=$713.39
1962	186.07	1.50	1.8	$502.39	30.14x24	=$723.36
1963	186.07	1.75	1.8	$586.12	35.17x23	=$808.85
1964	186.07	2.00	1.8	$669.85	40.19x22	=$884.20
1965	186.07	2.25	1.8	$753.58	45.21x21	=$949.51
1966	186.07	2.50	1.8	$837.32	50.24x20	=$1,004.78
1967	186.07	2.75	1.8	$921.05	55.26x19	=$1,049.98
1968	186.07	3.00	1.8	$1,004.78	60.29x18	=$1,085.52
1969	186.07	3.08	1.8	$1,004.78	60.29x17	=$1,024.94
1970	186.07	3.48	1.8	$1,165.54	69.93x16	=$1,118.92
1971	186.07	3.88	1.8	$1,299.51	77.97x15	=$1,169.56
1972	186.07	4.28	1.8	$1,433.48	86.00x14	=$1,204.00
1973	186.07	4.68	1.8	$1,567.45	94.00x13	=$1,222.61
1974	186.07	5.08	1.8	$1,701.42	102.08x12	=$1,225.02
1975	186.07	5.48	1.8	$1,835.39	110.12x11	=$1,211.36
1976	186.07	5.88	1.8	$1,969.36	118.16x10	=$1,181.62
1977	186.07	6.28	1.8	$2,103.34	126.20x9	=$1,135.80

SCHEDULE A (continued)

1978	186.07	6.68	1.8	$2,237.30	134.24x8	=$1,073.90
1979	186.07	7.08	1.8	$2,371.28	142.28x7	=$995.95
1980	186.07	7.50	1.8	$2,511.95	150.72x6	=$904.30
1981	186.07	7.50	1.8	$2,511.95	150.72x5	=$753.60
1982	186.07	7.50	1.8	$2,511.95	150.72x4	=$602.88
1983	186.07	8.50	1.8	$2,846.87	170.81x3	=$512.44
1984	186.07	9.50	1.8	$3,181.80	190.91x2	=$381.82
1985	186.07	9.50	1.8	$3,181.00	190.91x1	=$190.91
1986	186.07	9.50	1.8	$3,181.00	190.91x0	=$00.00
				$46,321.57	+	$26,234.21

OVERALL TOTAL = $72,465.78

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[1] 186.06 acres stipulated to by counsel
[2] AUM from Plaintiff's Exhibit 1011
[3] AUM per acre from testimony of Dennis Olson
[4] Grazing value and interest total as of 12/31/86

29 FPC 534

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Public Utility District No. 1 of Pend Oreille County, Washington) Project No. 2042

ORDER APPROVING REVISED PROJECT EXHIBITS AND ADJUSTING ANNUAL CHARGES

(Issued March 18, 1963)

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L.J. O'Connor, Jr., and Charles R. Ross

On June 12, 1961, Public Utility District No. 1 of Pend Oreille County, Washington, licensee for major Project No. 2042 [issued, 11 FPC 786 (1952)], filed for Commission approval revised Exhibits K and L. The project, known as the Box Canyon Project, is situated on the Pend Oreille River in the State of Washington, and affects lands of the United States within the Kaniksu and Coleville National Forests.

Commission approval of revised Exhibit L would allow the project to be so operated that the backwater on the Albeni Falls project of the Corps of Engineers, Department of the Army, would be two feet instead of one foot. Commission approval of revised Exhibit K would reflect minor changes in the project boundary to include therein 0.29 acre of lands of the United States affected by the increase in backwater effect in the lower end of the project reservoir, with a resultant increase in the annual charges for the use of such lands.

The licensee states that the proposed changes are necessary and desirable because experience has shown that the original backwater curves do not provide for sufficient head loss through the canyon immediately upstream from the

Box Canyon dam, thus reducing the available head at Box Canyon when maintaining one foot of backwater at Albeni Falls. The licensee stated also that the proposed two feet of backwater at Albeni Falls will provide some additional head over that originally contemplated at Box Canyon dam.

The Secretary of the Army and the Chief of Engineers, have reported that the proposed increase in backwater will have no adverse effect on navigation interest; that additional license terms or conditions in the interest of navigation are not considered necessary; and that the existing agreement between the licensee and the Corps, required by Article 29 of the license, provides for repayment of power loss at Albeni Falls based on the actual backwater experienced during operation, and, therefore, the agreement will not require change because of the proposed increase in backwater.

The Department of Agriculture has advised that the effected Exhibit K, sheet 1 (FPC No. 2042-12), as revised to show the additional lands of the United States to be occupied by the project, is adequate for the protection and utilization of the Coleville National Forest, and there is no objection to Commission approval of the revised exhibit.

The staff has made the changes in the affected Exhibit K and L tracings pursuant to the licensee's authorization in letter dated October 11, 1961.

The Commission finds:

(1) Exhibit K-1 through -5 (FPC No. 2042-12 through -6), as revised, and Exhibit L-5 and -6 (FPC No. 2042-23 and -24), as revised, conform to the Commission's rules and regulations and should be approved as part of the license for the project, and Exhibit K-1 through -5 (FPC No. 2042-12 through - 16) and Exhibit L-5 and -6 (FPC No. 2042-23 and -24) now parts of the license and which have been superseded should be eliminated from the license.

(2) The increased annual charges for recompensing the United States for the use of additional lands of the United

States by the project is reasonable as hereinafter fixed and specified.

The Commission orders:

(A) The revised exhibits described in finding (1) above are hereby approved as part of the license for Project No. 2042, and the exhibits described in the same finding as being superseded are hereby eliminated from the license.

(B) Subparagraph (ii) of the Article 36 of the license, as revised, is further revised to read as follows:

> (ii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, $338.26.

(C) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this order. In acknowledgment of the acceptance of this order, it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

/s/
Joseph H. Gutride,
Secretary.

16 FPC 1008

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of Public Utility District No. 1 of Pend Oreille County, Washington	Project No. 2042

ORDER APPROVING EXHIBIT AND PRESCRIBING ANNUAL CHARGES

October 3, 1956

In compliance with article 38 of its license as modified for project No. 2042, Public Utility District No. 1 of Pend Oreille County, Wash., licensee, filed on August 7 and 10, 1953, revised exhibit F and revised exhibit K (F. P. C. Nos. 2042-12 through 2042-20) showing the project boundary and project area as finally established.

The effect of approving exhibit K will be to establish the area of Government lands partly within Kaniksu and Colville National Forests occupied by the project and to fix and specify the annual charges, not heretofore specified in the license, for such occupancy. Approval of exhibit F is not required under our rules and regulations.

The Commission finds:

(1) The above-described revised exhibit K conforms to the Commission's rules and regulations.

(2) The amount of annual charges hereinafter specified for inclusion in article 36 of the license for the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands is reasonable.

The Commission orders:

(A) The revised exhibit K referred to in finding (1) above is hereby approved as part of the license for project No. 2042.

(B) Paragraph (a) of the February 5, 1952, order issuing the license for project No. 2042 is revised to read as follows:

> (a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the licensee or by the United States; the location of such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license or for amendment thereof and which are designated and described as follows:

Exhibit J: (F. P. C. No. 2042-11) General map, filed with the Commission on November 8. 1951.

Exhibit K (revised): Land maps in 9 sheets, sheets 1 through 9, (F. P. C. Nos. 2042-12 through 2042-20) filed with the Commission on August 10, 1953.

(C) Paragraph (ii) of article 36 of the license is revised effective as of February 1, 1952, to read as follows:

> (ii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, $337.56.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided by section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this instrument. In acknowledgment of the acceptance of this instrument it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

11 FPC 786

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of Public Utility District No. 1 of Pend Oreille County, Washington	Project No. 2042

ORDER ISSUING LICENSE (MAJOR)

February 5, 1952

Application was filed October 8, 1951, by Public Utility District No. 1 of Pend Oreille County, Newport, Wash., for license under the Federal Power Act (hereinafter referred to as the Act) for proposed major Project No. 2042, known as the Box Canyon project, to be located on the Pend Oreille River in Pend Oreille County, Wash., and Bonner County, Idaho, at a site about three miles north of the town of Ione, Pend Oreille County, Wash., and affecting public lands, lands of the United States within Kaniksu National Forest, and allotted lands within Calispel Indian Reservation.

The Clark Fork River has its source in the Rocky Mountains near Butte, Mont. It follows a northwesterly course to St. Regis, Mont., and then flows eastward 26 miles to the mouth of the Flathead River, its largest tributary, where it resumes its course northwestward to Pend Oreille Lake in Idaho. From Pend Oreille Lake to the Columbia River into which it flows, the stream is called the Pend Oreille River. This stretch flows westward from the lake to the Washington-Idaho line, thence northerly to the international boundary between the United States and the Dominion of Canada. Just north of the boundary, the Pend Oreille River resumes its westward course to its mouth on the Columbia River.

In its December 15, 1936, order authorizing issuance of a license to Pend Oreille Mines & Metals Company for proposed project No. 1393 on the Pend Oreille River at Metaline Falls approximately 8 miles downstream from the proposed Box Canyon project, the Commission found, among other things, that the project is situated along and in a navigable water of the United States.

In its December 15, 1936, order denying an application for license filed by Hugh L. Cooper, of New York City, for proposed project No. 44, known as the Z Canyon project, situated on the Pend Oreille River (Clark Fork) 13 miles downstream from the Box Canyon project, the Commission found, among other things, that the project is located on, across, along, and in, and will affect the navigable capacity of the Clark Fork of the Columbia River, a navigable water of the United States. The application was denied because the applicant failed to make the required showing of his financial ability to construct the project and of a market for the project power.

The proposed project would consist of:

(a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the applicant or by the United States; the location of such lands being tentatively shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit J: (FPC No. 2042-11) a general map entitled "Box Canyon Power Project"

Exhibit K: Land maps in 9 sheets (FPC No. 2042-12 through FPC No. 2042-20), entitled "Box Canyon Project"

--all of the above-described exhibits having been signed on September 28, 1951: Public Utility District No. 1 by John

M. Fountain, Commissioner, Chairman; F.R. Jordan, Commissioner; and F.W. Schwab, Commissioner, Secretary.

(b) Principal structures consisting of:

1. A dam, comprising a spillway gate structure with an over-all length of about 260 feet and containing four split-leaf, vertical lift, fixed wheel gates each 40 feet wide and 69 feet high;

2. A reservoir backing water upstream about 55 miles to the Albeni Falls project of the Corps of Engineers with pondage only, for load factoring purposes whenever the flow of river is below about 20,000 cubic feet per second;

3. A forebay open channel extending about 400 feet downstream along the left bank of the river, with a stop-log ice sluice at the lower end;

4. A powerhouse to contain four vertical turbine-generator units each of 24,500 horsepower at 41-foot net head, and 15,000 kilowatt rated capacity (total 60,000 kilowatt at 0.9 P. F., and 98,000 horsepower);

5. A switchyard containing the necessary switching and transforming equipment; and

6. Miscellaneous structures and facilities.

--the location, nature, and character of which structures are more specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit L: Plans in six sheets, signed on September 28, 1951: Public Utility District No. 1, by John M. Fountain, Commissioner, Chairman; F.R. Jordan, Commissioner; and Attest:

F.W. Schwab, Commissioner, Secretary; and entitled:

Sheet 1: (FPC No. 2042-2) "Box Canyon Power Project - General plan."

Sheet 4: (FPC No. 2042-5) "Box Canyon Power Project - Typical sections - Water Conductors."

Sheet 6: (FPC No. 2042-7) "Box Canyon Power Project - Powerhouse - plan & sections - sheet 1."

Sheet 7: (FPC No. 2042-8) "Box Canyon Power Project - Powerhouse - Plan & Sections - Sheet 2."

Sheet 8: (FPC No. 2042-9) "Box Canyon Power Project - One Line Diagram."

Sheet 9: (FPC No. 2042-10) "Box Canyon Power Project - Switch Yard - Plan & Section."

Exhibit M: (in three sheets) entitled "General Description and Specifications of Equipment," signed Public Utility District No. 1 of Pend Oreille County by John M. Fountain, President; E.R. Jordan, Commissioner; and F.W. Schwab, Secretary; and filed with the Commission on December 5, 1951.

(c) All other structures, fixtures, equipment, or facilities used or useful in the construction, operation, and maintenance of the project and located in the project area, including such portable property as may be used or useful in connection with the project whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also all riparian and other rights, the use or possession of which

is necessary or appropriate in the maintenance or opinion of the project.

The Exhibit K maps referred to in paragraph (a) above are not complete in that the extent to which the project will encroach upon lands of the United States is not presently determinable, and the acreage of land encroached upon by the project works in each subdivision is omitted from the maps. It will be necessary, therefore, for the applicant to resubmit completed Exhibit K maps at a later date for Commission approval as hereinafter provided.

The Commission issued a preliminary permit to the applicant herein for a period of six months, effective as of February 1, 1951, which permit, pursuant to application therefor, was extended to December 31, 1951, by Commission order dated October 2, 1951.

The Acting Chief, Forest Service, acting for the Secretary of Agriculture, who has supervision over the Kaniksu National Forest, the Office of the Chief of Engineers, Department of the Army, and the Acting Secretary of the Interior, have reported on the application.

Numerous informal protests against the application and requests for hearing thereon have been received from owners of farm land and others in the vicinity of the proposed project who allege that:

(1) They have received no assurance from the applicant herein that they will be adequately compensated for any resulting damage;

(2) There is no actual need for additional power in the area;

(3) There is no satisfactory showing of any economic necessity for construction of the project; and

(4) Any benefits derived from the project would not offset resulting flood damage to privately owned property.

In addition to the protests just referred to, a substantial number of individuals as members of the Calispel Indian Tribe have protested informally against the application and requested a hearing thereon alleging probable damage to pasture and hay lands.

Having given full consideration to these protests, it should be noted that:

(1) The Federal Power Act requires, as hereinafter provided, that the licensee shall conform with such rules and regulations as the Commission may prescribe for the protection of life, health, and property, and the licensee shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project - the determination and fixing of such damages being a matter for the local courts of competent jurisdiction to decide when satisfactory settlement cannot be negotiated.

(2) The Pacific Northwest Region has been deficient in dependable capacity to supply the area loads from 1946 to 1951 and will continue to be deficient until 1956, even if all projects now under construction and proposed for construction are constructed and completed on time and probably the said region will not have an ample amount of dependable power supply until 1959 or later.

(3) In letters dated January 3, 1951, and November 26, 1951, the Defense Electric Power Administration urged the Commission to give early and favorable consideration to the Box Canyon project.

(4) In the river channel immediately above the proposed Box Canyon dam and for possibly 24 miles upstream, the water level will be higher than under natural conditions for flows up to about 90,000 cubic feet per second due to the operation of the Box Canyon project, but with the same flows, water levels farther upstream will differ little from natural

conditions. For flows above 90,000 cubic feet per second, the operation of the project will have little if any effect on water levels. In general, damage to privately owned lands will be small but will have to be compensated for by the licensee where it does occur. On the other hand, the project will provide a substantial block of high load factor power in a relatively short time which is badly needed in the Pacific Northwest at low cost which is necessary for the large power-consuming defense industries.

(5) The proposed Box Canyon project is a run-of-river type project with limited pondage. The Pend Oreille River at the Box Canyon project site will be regulated by the Hungry Horse reservoir and Flathead Lake and reregulated in Pend Oreille Lake by the Albeni Falls project now under construction by the U. S. Corps of Engineers. The flow passing the Box Canyon project, therefore, will be virtually equal to that released from the Albeni Falls reservoir.

(6) The Commission's staff has reviewed the report of the Harza Engineering Co. on the project which includes extensive backwater studies made in collaboration with the Corps of Engineers. Streamflow studies indicate that the mean annual flood at the project site is on the order of 90,000 cubic feet per second. The flood of June 1948, was measured by the Corps of Engineers and the United States Geological Survey and the peak discharge was determined to be 168,700 cubic feet per second at Albeni Falls and 171,300 cubic feet per second at "Z" Canyon. Operation of the Box Canyon project contemplates that all spillway gates will be opened when the stream has reached a flow of 90,000 cubic feet per second and natural stream flow conditions will prevail for all flows in excess of this amount. The dam will consist of a deep-gated spillway in the main river channel, adequate in capacity to pass all expected flood flows without reservoir backwater effects.

(7) The proposed plan of operation for the project contemplates that from about July to mid-September the tentative reservoir operating schedule will result in minimum flooding effects on existing productive wild hay lands and that during the ensuing non-growing winter and early spring months operation involving one foot of backwater effect at Albeni Falls will prevail for flows up to 90,000 c.f.s. Operation during the spring and summer flood period may be available but will be such as not to augment either local flooding within the diked areas or the natural hazards of overtapping any of the main dikes along the river.

(8) The applicant proposes to install continuous recorder and station gages at important points in the stream between the Box Canyon dam and Albeni Falls project. In connection with the operation of the reservoir and its relation to flooding in the Calispel Valley, the applicant also proposes to install a continuous recorder gage near the mouth of Calispel Creek at Cusick. These readings will be telemetered to the operating rooms of the Box Canyon powerhouse on a continuous basis. The operation of these gages should provide a reliable means of adhering closely to the proposed operating plan.

(9) A public hearing was held August 28, 1951, in Cusick, Washington, by the applicant herein, Public Utility District No. 1 of Pend Oreille County, Washington, at which hearing the proposed operating plan for the proposed Box Canyon project and its effects on lands adjoining the river were discussed at length by interested persons.

The Commission, having considered the entire record in this proceeding, including all informal protests and requests for hearing on the application, finds:

(1) The Pend Oreille River, at the site of the applicant's proposed project No. 2042, is a navigable waterway

of the United States, and, therefore, construction and operation of the applicant's proposed project will affect the interests of interstate or foreign commerce.

(2) The applicant is a municipal corporation organized under the laws of the State of Washington and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

(3) No conflicting application is before the Commission. Public notice has been given.

(4) The applicant has submitted satisfactory evidence of its financial ability to construct and operate the proposed project.

(5) Except to the extent that under certain conditions there will be encroachment on the tailwater at the Albeni Falls Project, the proposed project does not affect any Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(6) The issuance of license for the project as hereinafter provided will not interfere or be inconsistent with the purposes of any withdrawal of public lands nor with the purposes for which the Kaniksu National Forest was created or acquired.

(7) Under present circumstances and conditions and upon the terms and conditions hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(8) The installed horsepower capacity of the project hereinafter authorized is 98,000 horsepower, and, except for the period immediately after construction, the applicant proposes to use the power from the project in Pend Oreille County for domestic and industrial purposes. Immediately after construction, the power will be channeled into the defense program, either for aluminum industry or other defense needs, in accordance with the request of Defense Electric Power Administration.

(9) The amount of annual charges to be paid under the license for the purposes of reimbursing the United States for the costs of administration of Part I of the Act, and for recompensing it for the use, occupancy, and enjoyment of its lands is reasonable as hereinafter fixed and specified.

(10) In accordance with section 10(d) of the act, the rate of return upon the net investment in the project, and the proportion of surplus earnings to be paid into and held in amortization reserves, are reasonable as hereinafter specified.

(11) The exhibits designated and described in paragraphs (a) and (b) above conform to the Commission's rules and regulations and should be approved as part of the license for the project.

The Commission orders:

(A) This license is issued to Public Utility District No. 1 of Pend Oreille County, Newport, Washington, under section 4(e) of the Act, for a period of 50 years, effective as of February 1, 1952, for the construction, operation, and maintenance of Project No. 2042 affecting navigable waters and lands of the United States, subject to the terms and conditions of the act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license shall also be subject to the terms and conditions set forth in form L-6 entitled "Terms and Conditions of License for Unconstructed Major Projects Affecting Navigable Waters and Lands of the United States", which terms and conditions, described as articles 1 through 27, are attached hereto and made a part hereof, except for article 12, and subject to the following special conditions set forth herein as additional articles:

Article 28. The licensee shall commence construction of the project within one year from the effective date of the license, shall thereafter in good faith and with due diligence prosecute such construction, and shall complete the project works within two years from beginning of construction.

Article 29. The licensee shall, prior to beginning of operation of the Albeni Falls power plant, enter into an agreement with the Chief of Engineers, Department of the Army, or his designated representative, to compensate the United States for encroachment on the Albeni Falls project resulting from the operation of the Box Canyon project. In the event no satisfactory agreement is concluded by such time, then the Commission shall fix and determine the compensation to be made by the licensee to the United States for such encroachment after notice and opportunity for a hearing.

Article 30. The United States shall not be liable for claims for any damages resulting from releases from the Albeni Falls project into the licensee's reservoir.

Article 31. The licensee shall construct, maintain, and operate such protective devices and comply with such reasonable modification of the project structures and operation in the interest of fish and wildlife resources as may be hereafter prescribed by the Federal Power Commission upon the recommendations of the Washington State

Department of Game, the United States Forest Service, and the Secretary of the Interior.

Article 32. The Licensee agrees that should the project works be damaged or the power output of the project be reduced by subsequent upstream diversion of the waters of the Pend Oreille and Clark Fork Rivers upstream from the Box Canyon site by the United States in connection with its irrigation and conservation program, then the United States shall have the option, in full settlement of any and all claims by the Licensee, of paying such damages as the Licensee shall then be entitled to receive as a matter of law, or of acquiring the Licensee's project in the manner provided by the Act.

Article 33. The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Calispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel Indian Community Council and the Licensee.

Article 34. The Licensee shall clear all lands in the bottom and margin of the reservoir up to high-water level before it is filled and shall dispose of all temporary structures, unused timber, brush, refuse, and inflammable material resulting from the clearing of the lands or from construction of the project works to the satisfaction of the Commission's authorized representative and after the project is placed in operation all trees along the shores of the reservoir which die shall be removed.

Article 35. At such time as the Commission may direct and to the extent that it is economically sound and in the public interest to do so, after notice and

opportunity for hearing, the Licensee shall install an additional generating unit.

Article 36. The Licensee shall pay to the United States the following annual charges:

(i) For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, one cent per horsepower on the authorized installed capacity (98,000 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during each calendar year for which the charge is made;

(ii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, an amount to be determined by the Commission.

Article 37. The Licensee shall submit, in accordance with the Commission's rules and regulations, Exhibit "L" drawings showing the final design of the proposed spillway structure; and the licensee shall not begin construction of that dam until the Commission shall have approved the drawings.

Article 38. Within one year from the effective date of this license, the Licensee shall revise and submit for Commission approval Exhibits "F" and "K" in accordance with the Commission's rules and regulations.

(C) The exhibits designated and described as Exhibits "J", "L", and "M" in paragraphs (a) and (b) above are approved as part of this license.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided by section 313(a) of the Act.

(E) This license shall be signed for the Licensee and returned to the Commission within 60 days from date of issuance of this order in testimony of its receipt and acceptance.

By the Commission.

/s/
Leon M. Fuquay,
Secretary.

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON 25,D.C.

Jan. 18, 1952

Re: Project No. 2042

My Dear Mr. Buchanan:

In a letter of November 6, 1951, the Commission requested the comments of the Department of the Interior on an application for a license for Project No. 2042 filed by Public Utility District No. 1 of Pend Oreille County, Washington; Newport, Washington. In a letter of December 6, the Commission furnished us with revised prints of maps comprising Exhibits "J" and "K" of the application. In a letter of December 12, the Commission transmitted to the Department a copy of Exhibit "M" of the application by which the applicant proposes to install four turbines with a total rated capacity of 98,000 horsepower instead of 83,000 horsepower as had been previously indicated.

Project No. 2042, to be known as the Box Canyon Project, would be located on the Pend Oreille River in Pend Oreille County, Washington, and Bonner County, Idaho. The project works would include a dam about three miles downstream from Ione, Washington. The dam would be a spillway gate structure about 260 feet long with four verticle-lift gates, each 40 feet wide and 69 feet high. The reservoir created by the dam would extend upstream about 55 miles to the Albeni Falls project, authorized for construction by the Corps of Engineers, United States Department of the Army. The Box Canyon project would have an open forebay channel about 400 feet long extending along the left ban of the river. This channel would have a concrete and stop-log ice sluice at the lower end. The project would have a reinforced powerhouse containing four verticle turbine-generator units with a total capacity of 60,000 kilowatts. According to the material transmitted with your letter of December 12, these

units will be able to deliver 69,000 kilowatts. Other facilities of the project would include a switchyard and other miscellaneous structures.

In our letter of August 11, 1950, commenting on the application of Public Utility District No. 1 of Pend Oreille County for a preliminary permit, we pointed out that the project would be incompatible with construction of the Boundary Dam or Z Canyon Dam on the Pend Oreille River by the Federal Government in accordance with comprehensive plans of the Corps of Engineers and the Department of the Interior. We also pointed out in that letter the adverse effect which the Box Canyon project would have on fishery resources of the area. In issuing the preliminary permit the Federal Power Commission directed that the permittee cooperate with State and Federal agencies concerned with the conservation of fish and wildlife resources in the development of the plans for the project. The preliminary permit also directed the permittee, in the development of plans and method of operation of the project, to cooperate with the Department of the Army, which has primary jurisdiction over Federal water resource developments on the Pend Oreille River under the agreement of April 11, 1949, between that Department and the Department of the Interior.

This Department is now glad to endorse the application of Public Utility District No. 1 for a license for Project No. 2042 and to recommend that the license be issued as promptly as possible, subject to the conditions and stipulations recommended in this letter. In view of the continuing need for additional power resources in the Pacific Northwest, it is hoped that Public Utility District No. 1 of Pend Oreille County can construct the project on the fastest possible schedule.

As indicated in our letter to the Commission of August 11, 1950, the Box Canyon project will destroy the fishery value of a highly prized section of the Pend Oreille River, from the project dam upstream to the Albeni Falls project. If the Box Canyon project were not constructed, the present successful fishing for rainbow and cutthroat trout in that

reach of the river might be expected to increase greatly. The project reservoir, on the other hand, will encourage development of trash fish population now limited by the fast-flowing stream. The Box Canyon Reservoir fishery will not be nearly so attractive as the stream fishery destroyed, nor will it be comparable in quality to the numerous natural lakes in the vicinity.

If the reservoir of the Box Canyon project will never exceed an elevation of 2,025 feet above sea level, there will be little damage to wildlife as a result of the construction of the project. If, however, reservoir elevations 10 or more feet higher should occur, a serious loss of wildlife habitat will result from the flooding of the Calispell Flats area near Cusick. These lowlands constitute excellent habitat for deer and upland-game bird.

Unfortunately, no practicable means of avoiding losses to fish and wildlife which will be caused by the construction of the Box Canyon project are immediately apparent. The possibility of developing means and measures for protection of these resources as detailed plans for the project become available, during as well as after construction, should be recognized and means for implementing them assured by inclusion in the license of the general recommendations incorporated in stipulations 1, 2 and 3, presented subsequently in this letter.

The Boundary project of the Corps of Engineers or the Z Canyon project incorporated in this Department's comprehensive plan for the Columbia River Basin would result in greater hydroelectric power production at less cost than the Box Canyon project. It seems clear however that the construction of either of these projects in accordance with preliminary plans which have been developed for them would harm mining activities and mineral resources and that there would be delay in the initiation of construction on either project. In this circumstance, and in light of the need for fast development of new power resources, it is the position of this Department that the Box Canyon project should go ahead even though it might mean the elimination or modification of plans for the Boundary project or the Z Canyon

project when and if either is constructed. Box Canyon's power can be made available to the energy-short Pacific Northwest in a comparative short time in contrast to the long delay in prospect for the fulfillment of indefinite Federal plans for development at that part of the Pend Oreille River.

Nevertheless, the construction of the Box Canyon project ought to be consistent with other phases of Federal plans for beneficial water resource development of the Columbia River Basin. This means that a provision should be incorporated in the license to protect rights to water supply for existing and potential irrigation projects which lie in the basins of the Pend Oreille and Clark Fork Rivers upstream from the Box Canyon site. Otherwise, power-water rights which may be associated with the operation of the Box Canyon project, would have to be purchased for the benefit of upstream irrigation development and other beneficial consumptive uses. This would result in higher cost for these uses. It is therefore requested that stipulation No. 4, subsequently presented in this letter, be incorporated in the license in order to insure that the Box Canyon project will be in harmony with the optimum development of the water resources of the Columbia River Basin.

Plans for the Box Canyon project developed by the applicant provide that the Box Canyon pool will encroach about one foot on the tailwater of the Albeni Falls project. The Applicant estimates that this small encroachment will increase the head of Box Canyon by 7½ or 8 feet. This Department has no objection to this encroachment providing that the United States is compensated for the resulting loss of power at Albeni Falls and that suitable arrangements between the Licensee and the Federal government are made with respect to the net gain in power production. Stipulation No. 5, herein recommended, is intended to cover these points.

The Applicant has recognized that hydraulic and electrical integration of the Box Canyon project with the Federal power system in the Pacific Northwest is essential to the financial feasibility of the project. Accordingly, present plans of the applicant provide for the integration of the Box Canyon plant with existing and proposed Federal power

plants and reservoirs of the Pend Oreille-Clark Fork Rivers and those on the Columbia River, including inter-connection with the Federal transmission system. The applicant realizes that the operations must be based upon releases from Albeni Falls, which in turn are related to operations of the entire river system for maximum power, flood control, and other benefits. It is contemplated that the interchange contract will be entered into by the Licensee and the Bonneville Power Administration of this Department, which would provide for delivery of energy from the Federal system to the Public Utility District No. 1 of Pend Oreille County at such times as the capability of Box Canyon is reduced by low stream flows or spring floods. The contract would also provide for the return of energy to the Federal system at other times or for periodical payment for balances in the exchange account. Provision for these arrangements should be formalized in the license by stipulation No. 6, set forth herein.

The Applicant's plan of operation for Box Canyon includes the use for power production purposes of releases from upstream storage reservoirs constructed by the Federal Government. The Applicant's estimated payments for project benefits due to upstream regulation of the river, as shown in its financial analyses of the project, are substantially less than those estimated by the Bonneville Power Administration and the Bureau of Reclamation.

The power produced at Box Canyon temporarily would be in excess of requirement of service area of Public Utility District No. 1 of Pend Oreille County. An understanding has been reached between the Bonneville Power Administration and the Public Utility District for the use of facilities of the Administration to transmit such temporary excesses of power supply to defense loads in the Region. Existing facilities of the Administration can be made available for this purpose.

The Box Canyon project would be located approximately 30 miles downstream from the Kalispel Indian Reservation in Pend Oreille County. Indian lands and interests on this Reservation will not be adversely affected if backwater from the dam is not allowed to raise the water-surface levels adjacent to Indian lands during flood flows. The spillway gates at Box Canyon should be so operated that the maximum river water surface elevations adjacent to Indian lands will not damage those lands. Stipulation No. 7, as presented in this letter, should be incorporated in the license to effectuate this provision or to provide for adequate compensation to the Indians in case damage is incurred as the result of the Box Canyon operation.

In our letter of August 11, 1950, commenting on the application for a preliminary permit for Project No. 2042, we suggested that the project would adversely affect two limestone deposits. Inasmuch as quarries at these two deposits are idle at the present time, the Department of the Interior does not object to the granting of the license on the grounds of harm to mineral interests.

The records of the Geological Survey of this Department indicate that the construction and operation of the project would not affect adversely the purposes of any withdrawal or classification recommended by the Survey, deposits of coal or other minerals, except the limestone deposits noted in the preceding paragraph, or lands within the known geologic structure of a producing oil or gas field.

Stream-gaging was required under the preliminary permit and supervision of the stream-gaging work was assigned to the Geological Survey. It is assumed that continued supervision by the Survey of this work will be provided for in the license.

Stipulations Recommended

In the light of the considerations set out in this letter, the following stipulations are recommended by the Department of the Interior for incorporation in the license issued to the Public Utility District No. 1 of Pend Oreille County, Washington, by the Federal Power Commission for the construction and operation of Project No. 2042.

1. The entire project area, except for such portions as may be reserved for reasons of safety and efficient operation, shall be open to free use by the public for purposes of fishing, hunting, and other recreational pursuits.

2. Practical and reasonable means of mitigating the losses to fish and wildlife caused by construction and operation of the project, of increasing biological productivity of the area, and of furthering public use of the area for recreational enjoyment shall be devised and developed through cooperation of the Licensee with the Washington State Department of Game, the Forest Service of the U.S. Department of Agriculture, and the Fish and Wildlife Service of the U.S. Department of the Interior.

3. The Licensee shall construct, maintain, and operate such protective devices and comply with such reasonable modification of the project structures and operation in the interest of fish and wildlife resources as may be hereafter prescribed by the Federal Power Commission upon the recommendations of the Washington Department of Game and the Secretary of the Interior.

4. The right of the Licensee to operate the project shall be, as against the United States or any water users organization claiming through the United States, subject to a net depletion of the flow of the Pend Oreille River at the dam site, by reason of subsequent use of the water in the Columbia River Drainage Basin above the dam site by the United States for irrigation or other beneficial

consumptive uses in connection with Reclamation projects hereafter undertaken in the Columbia River Drainage Basin under the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), as follows:

> Beginning with the year 1965, such net depletion to the extent of an aggregate of 70,000 acre-feet during any calendar year may be made without compensation to the Licensee. In determining such net annual depletion, account shall be taken among other things, of the return flows coming from such Reclamation projects.

5. The Licensee shall operate the project so as to encroach upon the tailwater level of the Albeni Falls Project of the United States only by agreement with the Bonneville Power Administration and the Corps of Engineers.

6. The Licensee shall operate the project in electrical and hydraulic integration with the Federal power system of the Pacific Northwest, and shall interconnect the project with the Federal regional transmission system.

7. The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Kalispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in manner and amount as determined by the Secretary of the Interior, after consultation with the Kalispel Indian Community Council and the Licensee.

* * *

Subject to the above seven stipulations, the Department of the Interior has no objection to the Issuance of a license for Project No. 2042, and, as previously stated, urges that the license be issued and the project constructed at the earliest possible time.

Sincerely yours,

[R.D. Searles]
/s/
Acting Secretary of the Interior

Hon. Thomas C. Buchanan
Acting Chairman
Federal Power Commission
Washington 25, D.C.

United States Attorney
Eastern District of Washington

851 United States Courthouse
Post Office Box 1494 *509/456-3811*
Spokane, Washington 99210-1494 *FTS/439-3811*

February 22, 1988

Mr. Jerry Boyd
Hamblen, Coffin, Brooke, & Miller
1200 Washington Trust Financial Center
Spokane, WA 99204

RE: United States of America et. al., v. Pend Oreille County PUD et. al., C-80-116-JLQ

Dear Mr. Boyd:

Enclosed is a copy of the Transcript Designation and Ordering Form. Please be advised that the United States is not designating any portion of the transcript.

Thank you.

Very truly yours,

JOHN E. LAMP
United States Attorney

[Earl A. Hicks]
/s/
EARL A. HICKS
Assistant United States Attorney

EAH/cm

(3)

No. 94-1090

Supreme Court, U.S.
FILED
FEB 16 1995
OFFICE OF

In the Supreme Court of the United States

OCTOBER TERM, 1994

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY, WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA AND
KALISPEL TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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Department of Justice
Washington, D.C. 20530
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals properly found that petitioner's trespass on the Indian trust lands at issue in this case had not been authorized by petitioner's license to operate a hydroelectric facility under the Federal Power Act.

2. Whether the federal courts are ousted of jurisdiction to adjudicate claims for trespass to Indian trust lands because the defendant asserts as a defense that its trespass was authorized by a license under the Federal Power Act to operate a federally licensed hydroelectric facility.

3. Whether the court of appeals improperly reversed any factual finding of the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1090

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY, WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA AND
KALISPEL TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-25a) is reported at 28 F.3d 1544. The decision of the district court (Pet. App. 33a-46a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1994. A petition for rehearing was denied on September 14, 1994. Pet. App. 1a-3a. The petition for a writ of certiorari was filed on December 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case was brought on March 31, 1980, by the United States as trustee for the Kalispel Indian Tribe and individual Kalispel Indians against petitioner Pend Oreille County Public Utility District No. 1. The complaint sought damages in trespass for unauthorized use of land held by the United States in trust for the Kalispel Tribe and individual Indian allottees, and an injunction to restrain petitioner's continuing trespass. The district court held that petitioner had trespassed on the lands in question and ordered that damages be paid. The court of appeals affirmed the district court's finding that petitioner had committed the trespass, but reversed the district court's calculation of damages and remanded for the district court to recalculate the amount of damages and to consider whether an injunction would be appropriate.

1. Petitioner operates the Box Canyon Dam on the Pend Oreille River in the State of Washington. Petitioner obtained a license for the project from the Federal Power Commission (FPC)—the predecessor of the Federal Energy Regulatory Commission (FERC)—on February 5, 1952, and the dam has been in operation since at least 1956. Pet. App. 33a, 45a.

The Pend Oreille River forms the western boundary of the Kalispel Indian Reservation, approximately 30 miles upstream from the Box Canyon Dam. Pet. App. 6a-7a, 11a. When the FPC was considering whether to issue the license, the Acting Secretary of the Interior wrote a letter to the FPC noting the proximity of the Reservation to the project and stating that "Indian lands and interests on this Reservation will not be adversely affected if backwater from the dam is not allowed to raise the water-surface levels adjacent to Indian lands during

flood flows." *Id.* at 72a. Accordingly, the Acting Secretary recommended that a stipulation be included in the license "to effectuate this provision or to provide for adequate compensation to the Indians in case damage is incurred as the result of the Box Canyon operation." *Ibid.*

As a result, the license ultimately issued to petitioner for the project included Article 33, which provides:

> The project shall be operated by [petitioner] in such a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by [petitioner] in the manner and amount as determined by the Secretary of the Interior, after consultation with the [K]alispel Community Council and [petitioner].

Pet. App. 64a.

2. In 1954, petitioner acquired easements to various parcels on the Kalispel Reservation. Pet. App. 36a. The easements were to property lying below 2031.3 feet above mean sea level and permitted petitioner to raise the water at a particular measuring station to a level no higher than 2028 feet above mean sea level. *Ibid.*

Petitioner operated its dam so as to raise the water level above the level for which it had acquired easements. Pet. App. 37a. Moreover, petitioner never acquired easements for all of the Indian lands that were flooded. *Id.* at 39a-40a. Petitioner knew that it was exceeding the easements that it had obtained. *Id.* at 37a. Petitioner attempted to secure additional easements, but their processing was delayed by the Indians and the government. *Id.* at 39a.

3. In 1980, the United States filed this action, alleging that petitioner's flooding of Indian trust lands in excess of that to which petitioner had acquired easements constituted a trespass. The United States sought damages to compensate the Indians for injuries resulting from petitioner's operation of the dam and an injunction to forbid petitioner's continued occupation of that land. The Kalispel Tribe intervened as plaintiff with respect to the trespass claims. Pet. App. 7a.

In its original liability ruling, the district court found that petitioner had trespassed on the lands in question by raising the level of the river. Pet. App. 7a. The court of appeals affirmed that finding, *United States* v. *Pend Oreille Public Utility District No. 1*, 926 F.2d 1502 (9th Cir.), and this Court denied review, 112 S. Ct. 415 (1991).

The district court then conducted proceedings to determine the amount of damages that petitioner should pay, to decide whether injunctive relief would be appropriate, and to resolve other remaining issues. The court calculated the amount of damages on the basis of the value of the flooded land as grazing land, not its value as part of the power project. Pet. App. 7a. The court also refused to grant injunctive relief. *Id.* at 41a. Finally, the district court dismissed a counterclaim filed by petitioner to condemn the land. *Id.* at 7a.

4. The court of appeals again affirmed the district court's conclusion that petitioner had trespassed upon the lands in question, but it reversed the district court's calculation of the amount of damages and remanded for further proceedings on that issue and to determine whether injunctive relief would be appropriate. Pet. App. 4a-25a.

With respect to liability for trespass, petitioner argued that Article 33 of the project license authorized it to flood Reservation land and compensate the Tribe at

the rate that petitioner pays private landowners—the rental value of the property as grazing land. Pet. App. 8a. The court of appeals rejected that argument. The court first noted that, on petitioner's prior appeal, it had rejected petitioner's argument that there was no trespass at all. The court further concluded that, in any event, petitioner's argument based on Article 33 was without merit. The court explained that, if read as petitioner suggested, Article 33 "would authorize the taking of Reservation land by inverse condemnation." *Id.* at 9a. The court explained that, because neither tribal land nor allotted Indian land may be taken by inverse condemnation, that would be an unreasonable reading of Article 33. *Id.* at 9a-10a. The court further explained that, although Article 33 contains an administrative remedy for a violation, "[n]othing indicates creation of this administrative remedy was intended to affect the rights of the Tribe and the United States if they choose instead to file a trespass action in federal court, as they did." *Id.* at 9a.

The court of appeals also held that the district court had erred in calculating damages by reference to state law, which measures damages in cases of this kind as the rental value of the land for grazing purposes. The court of appeals held that the appropriate measure of damages in this case is "the value of the tribal lands as part of the power project." Pet. App. 17a. The court recognized that that conclusion "is not compelled by regulation or case law." *Ibid.* The court nonetheless found it the "most acceptable measure of damages for [petitioner's] trespass," because it was reflected in the governing regulation at an earlier date and because it is "the formulation now applied by [FERC] in fixing annual charges for use of tribal lands on all power projects." *Ibid.* In addition, the court explained that "[i]ts use will

also assure the Tribe will not suffer an uncompensated loss from [petitioner's] past failure to comply with the [Federal] Power Act and will encourage future compliance." *Ibid.* Finally, the court held that the measure of damages it adopted would encourage future compliance with Sections 4(e) and 10(e)(1) of the Federal Power Act, 16 U.S.C. 797(e) and 803(e)(1) (1988 & Supp. V 1993). Pet. App. 18a.

ARGUMENT

1. Petitioner contends (Pet. 14-18) that the court of appeals erred in concluding that Article 33 of petitioner's FPC license did not authorize it to trespass upon Indian trust lands. The court of appeals correctly determined that the FPC license did not purport to authorize any trespass on Indian land. That fact-bound determination does not conflict with any decision of this Court or any other court of appeals.

Article 33 of petitioner's license does not by its terms authorize petitioner to flood Reservation land. To the contrary, it requires petitioner to operate its dam in such "a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation." Pet. App. 9a. That language is sufficient in itself to warrant the court of appeals' holding that petitioner had no authority to flood Indian lands without obtaining the necessary easements.

The court of appeals also identified several other reasons why Article 33 should not be interpreted to authorize petitioner to flood Indian lands without obtaining an easement. Each of those reasons reinforces the court's conclusion.

First, interpreting Article 33 to permit petitioner to flood Indian lands would in effect authorize inverse condemnation of such land. This Court held, however, in

United States v. *Clarke*, 445 U.S. 253, 258-259 (1980), that allotted Indian trust lands are not subject to inverse condemnation. Petitioner concedes that much of the land at issue in this case consists of allotted Indian trust lands.[1] Accordingly, petitioner's suggested interpretation of Article 33 is mistaken.[2]

Second, Article 33 could be construed to permit petitioner to flood Indian trust lands only if the FPC were informed that petitioner's project would have that effect before it issued the license and then acted pursuant to its powers under Section 4(e) of the Federal

---

[1] Petitioner argues (Pet. 12 n.5, 16, 18 n.6, 22, 25) that the court of appeals erred in concluding that its project trespassed on tribal trust lands, as well as allotted lands. The district court made no findings on that issue, but the record contains evidence that the lands affected by the dam included both tribal and allotted tracts. See C.A. E.R. 85 (affidavit certifying that certain tracts of land at issue were "tribal and individually owned lands held by the United States in trust status"). In any event, nothing in the court of appeals' decision turns on a distinction between tribal and allotted lands.

[2] Petitioner argues (Pet. 29) that *United States* v. *Clarke* should be overruled, on the ground that it is "an inappropriate limitation on the eminent domain rights of persons under state law." Pet. 29. There is no reason why state law would govern the question whether lands held in trust by the United States for a Tribe or individual Indians may be taken by inverse condemnation. Although the statute at issue in *Clarke*, 25 U.S.C. 357, permits condemnation of allotted lands under state law, this Court held that Section 357 does not authorize "inverse condemnation" of such lands. Petitioner offers no reason why that statutory holding should be reconsidered. Petitioner also argues (Pet. 28-29 & n.7) that this Court should make an exception to the *Clarke* rule for cases like this. Even if the equities of petitioner's claim justified such an exception, however, there is no basis in the language of Section 357 to make exceptions to the *Clarke* rule based on the equities of particular cases.

Power Act (FPA), 16 U.S.C. 797(e), to permit the project to go forward. Under Section 4(e), a license may not permit the use of lands on a federal reservation unless the Commission finds that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired," and the license must contain "such conditions as the Secretary [of the Interior] shall deem necessary for the adequate protection and utilization of such reservation[]." 16 U.S.C. 797(e). See generally *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

Article 33 cannot be construed to have permitted the project to flood the Kalispel lands at issue here under Section 4(e), because the FPC was not informed that the project would have that effect. Petitioner's license application indicated that the effects of the dam would be limited to the area 24 miles upstream from the dam; the Kalispel Reservation is 30 miles upstream from the dam. See Pet. App. 10a-11a, 58a-59a. Thus, the FPC's general finding that "[t]he issuance of license for the project * * * will not interfere or be inconsistent with the purposes of any withdrawal of public lands," *id.* at 61a, cannot be taken to be a Section 4(e) finding that the flooding of the Kalispel lands would be consistent with the purposes for which the Kalispel Reservation was created. Nor, for the same reason, could the Acting Secretary of the Interior's recommendation that Article 33 be included in the license constitute a Section 4(e) specification of conditions "necessary for the adequate protection and utilization of [the Kalispel] reservation[]." 16 U.S.C. 797(e).

Finally, interpreting Article 33 to have granted petitioner permission to flood Indian lands would require a finding that the FPC and the Secretary of the Interior had disregarded their duties under Section 10(e)(1) of the

FPA, 16 U.S.C. 803(e)(1) (1988 & Supp. V 1993). Under that provision, a licensee may not use tribal lands within a reservation unless the Commission fixes a "reasonable annual charge[]" for use of the lands and the Tribe approves that charge. In this case, the Commission did not fix any specific charge for flooding under Section 10(e)(1), and the Tribe did not approve any such charge.

Petitioner nevertheless contends that the court of appeals erred in construing its license. Petitioner contends (Pet. 15-18) that it fully informed the Commission about the effect of its project on the Indian lands, that the Secretary of the Interior proposed conditions to ameliorate that effect when he proposed the inclusion of what became Article 33 in petitioner's license, and that, since no tribal lands were affected, Section 10(e)(1) has no bearing on this case. For the reasons given above, we believe that the court of appeals correctly rejected petitioner's arguments. In any event, the language of Article 33 alone is sufficient to support the court of appeals' interpretation. Although petitioner proffers an alternative explanation of Article 33 and most of the surrounding documents in this case, further review would be unwarranted to resolve the narrow and fact-bound question whether the court of appeals erred in rejecting that explanation.

2. Petitioner also contends (Pet. 20) that the court of appeals had no jurisdiction over this case, because it involved review of an order issued by the FPC and "Congress neither granted the appellate court nor the district court jurisdiction to review or overrule orders entered by the Federal Power Commission under the Federal Power Act thirty to forty years after those orders were entered." Pet. 20.

Initially, it should be noted that petitioner argued below that the court of appeals *should* determine the

scope of its license. Petitioner's opening brief argued that "it would have been a simple matter for the District Court to issue a Declaratory Judgment concerning [petitioner's] legal rights under its license," that "[t]he record is clear and complete and fully supports the remedy requested by [petitioner]," and that the court of appeals "can grant such remedy based upon the record before the District Court." Pet'r C.A. Br. 65. Petitioner added that "[t]he refusal of the District Court to provide such a remedy was an abusive [*sic*] discretion because it did not provide full and complete adjudication of the issues." *Ibid.*

In any event, this case did not involve judicial review of an FPC order. Instead, it was an action for trespass, brought by the United States on behalf of the Kalispel Indian Tribe and individual Indian allottees. Although the court of appeals discussed petitioner's license in the course of rejecting its defense, the court neither attempted to nor did exercise the authority granted by 16 U.S.C. 825*l*(b) to "affirm, modify, or set aside [an order of the Commission] in whole or in part." Accordingly, the court of appeals properly exercised jurisdiction over this case.

Petitioner's theory appears to be that petitioner could divest the federal courts of jurisdiction over this case by interposing as a defense a claim that a federal license permitted the trespass. None of the cases cited by petitioner (Pet. 20) supports that theory. In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the FPC granted a license to a city that included the right to exercise eminent domain powers. The State was a party to the FPC proceedings and to the subsequent action in the court of appeals for judicial review of that decision. This Court held that the final judgment of the court of appeals in that action precluded later litigation among

the same parties over the same issue. 357 U.S. at 341. Since the United States, as trustee for the Indian lands at issue in this case, did not challenge the validity of any provision of petitioner's license and was not a party to any previous judicial proceeding involving petitioner's license, the decision in *Tacoma* has no bearing on the issues in this case.

In *DiLaura* v. *Power Authority*, 982 F.2d 73, 79 (2d Cir. 1992), the plaintiffs brought a claim for injunctive relief under the FPA without exhausting their administrative remedies before the Commission. The court of appeals held that it should therefore be dismissed. In *California Save Our Streams Council, Inc.* v. *Yeutter*, 887 F.2d 908, 911-912 (9th Cir. 1989), the plaintiffs sued the Forest Service, complaining about the procedures it had followed in recommending to the Commission that it impose certain conditions on a license under Section 4(e) of the Act, 16 U.S.C. 797(e). The court of appeals noted that the claim was in fact "an attempt to restrain the licensing procedures authorized by FERC," 887 F.2d at 912, and ordered the case dismissed. Because the claim in this case did not arise under the FPA and did not attempt to attack any procedural or substantive decision made by the Commission under the FPA, neither decision is of assistance to petitioner in this case.

3. Petitioner also asserts (Pet. i) that this case presents the question "[w]hether the United States Court of Appeals ha[s] the judicial power to reverse and overrule Findings of Fact entered by the district court which are supported by substantial evidence where there is no evidence or record to support the decision of the Court of Appeals." Petitioner does not specify which district court factual findings were improperly reversed or overruled. Although the court of appeals disagreed

with petitioner concerning the meaning of Article 33 of its license, the court's decision was not based on any factual disagreement with the district court. In any event, further review would not be warranted to determine whether the court of appeals misapprehended the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1995

(4)

No. 94-1090

Supreme Court, U.S.
FILED
FEB 16 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY, WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, AND
KALISPEL TRIBE OF INDIANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

KALISPEL INDIAN TRIBE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the federal courts have jurisdiction to adjudicate a claim that: a) certain lands are part of an Indian reservation and held in trust for a tribe or its members; b) use or ownership of those lands has not been acquired in accordance with federal law; and c) damages and injunctive relief should be awarded for the unlawful occupancy?

2. Should the Court abandon the rule that the use or ownership of Indian trust lands may only be acquired in a manner authorized by Congress and overrule *United States v. Clarke*, 445 U.S. 253 (1980), to permit the petitioner an inverse condemnation in this case?

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STATEMENT OF THE CASE

Nearly fifteen years ago, the United States, as trustee and fee owner of certain tribal and allotted lands within the Kalispel Indian Reservation, sued the petitioner (hereafter "PUD") in federal district court, claiming a trespass and seeking relief. The United States alleged that the reservoir of the PUD's Box Canyon power project was encroaching on these Indian trust lands.[1] The Kalispel Tribe intervened. The background and procedural history of this litigation is summarized by the Court of Appeals in its 1991 opinion in this case. *U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1504-1505 (9th Cir.), *cert. denied, sub. nom., Washington Dept. of Nat. Resources v. United States*, ___ U.S.___, 112 S.Ct. 415, 116 L.Ed.2d 436 (1991).

In its petition for review of the Court of Appeals' 1994 decision, the PUD mischaracterizes the facts and the law. Contrary to the PUD's repeated assertions that no tribal trust lands were involved, the record contains evidence that, at the time of the license application, the land which was to be flooded by the Box Canyon project included unallotted, tribal trust land. U.S. Complaint, E.D. Wa. No. C-80-116, Exhibit A, R. 1; Affidavits of Lila LaDue, Pl. Ex. 1003, R. 613. By 1987, approximately half of the reservation acreage inundated by the reservoir had been restored to tribal trust status. *Id.* In answering the trespass complaints, however, the PUD denied that

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[1] "Trust lands," as used in this brief, refers to lands in which the United States holds the fee title in trust either for the Kalispel Tribe or for individual Indians who own an interest in an allotment.

Indian trust lands were occupied by the Box Canyon reservoir. It did not plead that its Federal Power Act ("FPA") license authorized the occupancy of the Kalispel Indian Reservation. *See* Answer, 6/4/81, R. 4; Amended Answer, 5/5/82, R. 24, and 2/1/83, R. 69. The PUD's defense relied on the assertion that the ordinary high water line ("OHWL") lay at a 2041-foot elevation, the reservoir was therefore within state-owned riverbed over which the PUD had an easement, and no Indian trust lands were occupied by the project. *See, e.g.*, Answer, 2/1/83, R. 69; 926 F.2d at 1505.

Both the District Court, and the Court of Appeals in 1991, rejected the PUD's OHWL contention as contrary to long-standing legal prescriptions for locating the line. In the 1991 appeal, the Court of Appeals affirmed the District Court's conclusion that a trespass existed. 926 F.2d at 1505, 1507. The Court of Appeals examined both federal and state common law defining OHWL, found the relevant factors to be the same, and, relying on *Howard v. Ingersoll*, 54 U.S. (13 How.) 409 (1851) and *Austin v. City of Bellingham*, 69 Wash. 677, 126 P. 59 (1912), among other authority, affirmed the determination that the pertinent OHWL is at 2028 feet. 926 F.2d at 1505. The PUD attempted to relitigate the OHWL determination in a related, state court case. It asked the Washington State Supreme Court to overrule *Austin. PUD No. 1 v. Tombari Family Partnership*, 117 Wn. 2d 803, 819 P.2d 369 (1991). The Court declined and held that the PUD claim was barred by collateral estoppel. 117 Wn. 2d at 804-805, 819 P.2d at 370. This Court denied the PUD's certiorari petition as to the 1991 Court of Appeals decision. ___ U.S. ___, 112 S.Ct. 415.

The 1994 Court of Appeals decision arises from a separate appeal in "phase 3" of the litigation, which addressed the remedies for the trespass, specifically the measure of damages and the appropriateness of injunctive relief.[2] *See U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d at 1505. The PUD contended that no trespass determination had yet been made and sought to relitigate the trespass claim, this time arguing that Article 33 of its FPA license authorized the occupancy of Indian trust lands on the Kalispel Reservation.[3]

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[2] The rulings the PUD appealed essentially relate to its position that it may acquire permanent rights to occupy the Kalispel lands for power purposes without seeking an amendment to its FPA license. These rulings include the denial of the PUD's post-judgment motion for a declaration that the PUD has the right under its license to continue to occupy the trust lands and for an adjudication of the future payments, based on grazing value, which would be required. They also include the dismissal of a formal condemnation action. In addition to the United States' and Tribe's appeal of the damage measure and denial of injunctive relief, the Tribe appealed the denial of a motion to amend its complaint.

[3] Although the District Court heard evidence regarding the license during the 1987 trial and noted certain of its provisions in its Findings, the PUD did not request a ruling that the license authorized occupancy of the Kalispel trust lands until after the Court had rejected its contention that no Indian trust lands were being occupied and entered its Findings, Conclusions, and Judgment, adjudicating a trespass. *See* PUD's Motion to Amend Its Pleadings To Conform To Evidence To Seek A Declaratory Judgment Re: Operation of the Box Canyon Project And Future Damages Based On Grazing, filed October 5, 1987, R. 579; PUD's Motion For Declaratory Judgment Re: Operation of the Box Canyon Project And Future Damages Based On Grazing Value, filed October 5, 1987, R. 580.

The Court of Appeals held that the existence of the trespass had been established in earlier proceedings and that it was too late to relitigate that matter. The District Court had expressly ruled, in 1983, that the Kalispels were entitled to damages based on a "trespass." *USA and Kalispel Indian Tribe v. Pend Oreille Co. PUD and Dept. of Nat. Res., WA*, No. C-80-116, Findings of Fact and Conclusions of Law and Judgment, CL 5, R. 256. In 1987, noting the PUD license, the license amendment, and specifically Article 33, the District Court reiterated that, "The PUD has trespassed on a total of 186.07 acres of the Kalispel Indian Tribe and individual allottees." Findings of Fact and Conclusions of Law and Judgment filed August 10, 1987, CL 1, Petition for a Writ of Certiorari ("Pet."), Appendix ("App.") 42a. In 1991, the Court of Appeals, like the District Court, had described the OHWL issue as controlling the trespass adjudication:

> Following the district court's approach, we first consider whether the dam caused the waters of the river to trespass upon the Tribe's riparian lands where the river borders the reservation. The parties agree that the ordinary high water line of the river marks the boundary between riparian lands and riverbed. If the dam raised the river above this line a trespass upon the Tribe's riparian lands occurred. The dispute is over the location of this line.

926 F.2d at 1505 (footnote omitted).

While the Court of Appeals in 1994 ruled that relitigation of the trespass issue was precluded, it found the PUD's license argument to be "without merit," in any event. *U.S. v. Pend Oreille Public Utility Dist. No. 1*, 28 F.3d

1544, 1547 (9th Cir. 1994), App. 8a. License Article 33 requires the PUD to operate the Box Canyon project in "such a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation" and provides a procedure by which the Secretary of the Interior can determine compensation if harm occurs. Citing this Court's decisions in *United States v. Clarke*, 445 U.S. 253 (1980), *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) and *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Court of Appeals ruled that to construe Article 33 as authorization for the PUD to extend its reservoir onto the lands, subject to a claim for compensation, would mean that an unlawful inverse condemnation of Indian trust lands had been permitted and that the Commission had allowed occupation of the Kalispel Reservation without the special findings, conditions, and charges required by the FPA.[4] 28 F.3d at 1548-1549, App. 9a-10a. The Court ruled that the plain language of the license did not support that construction. The PUD then contended that the federal courts had no jurisdiction to determine whether the license authorized the occupation of the Indian trust lands. PUD's Petition For Rehearing, pp. 12-13.

Contrary to the PUD's assertion, the United States and Tribe had not challenged the propriety of the license or any of its terms, and the Court of Appeals did not hold

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[4] The Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, has been codified as Part I of the FPA, 16 U.S.C. § 791a *et seq.* For dates prior to October 1, 1977, "Commission" refers to the Federal Power Commission and thereafter to its successor, the Federal Energy Regulatory Commission. *See* 42 U.S.C. §§ 7172(a), 7295(b).

that the 1952, 1956 and 1963 FPC orders violated the FPA, or overrule or reverse the Commission. *Cf.*, Pet. pp. 10, 15. The United States and the Tribe sued to establish a trespass and obtain appropriate relief. Later in the litigation, the PUD argued as a defense that Article 33 of the license, which expressly prohibits any interference or damage to Kalispel lands, could be construed to permit the flooding. The district court had not so found when it declared a trespass in 1987. App. 42a. The United States and Tribe maintained that the plain language of the license documents and the applicable law clearly refuted the PUD's assertion that Article 33 could constitute authorization for the occupancy of the Kalispels' trust lands.

Although the PUD claims to have believed, when it applied for its license, that no Indian trust lands would be occupied by the reservoir because the OHWL was at 2041 feet, it proceeded to seek flowage easements from the BIA to flood Indian trust lands. In 1954, the PUD acquired six easements but these were limited to flows below 2031.3 feet and to 2028 feet during haying season and only affected some of the trust parcels. Findings of Fact (August 10, 1987), # 5, App. 36a. *Cf.* Pet. p. 6.[5] Feeling "frustrated," (Pet. p. 22), the PUD took the law into its own hands.[6] As specifically concluded by the District Court, the PUD simply violated the easements'

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[5] There were only six easements covering only 33.86 acres of the 186.07 acres of Indian trust lands flooded by the project. *See* Affidavit of Lila LaDue, Pl. Ex. 1004, R. 613.

[6] The PUD attributed part of this "frustration" to its own inaction in pursuing easement negotiations when "personnel at the PUD also changed." *See* PUD's Proposed Pretrial Order (May 27, 1987), Factual Contentions, # 11, p. 11, R. 553.

limitations and knowingly occupied trust lands for which no easement had been granted. FF # 9, 10, App. 37a, 39a-40a. At closing argument following the 1987 trial, the Court explained its view of the PUD's easement defense:

> And with everybody else you got your easements. I don't know what they were, but you got them and then you proceeded onward. You proceeded onward at a time when you didn't have the easements from the Indians, and you chose to do so somewhat at your own peril, because the Indians are a whole different thing, and everybody knows that. You probably, or should have known it even before this morning.
>
> So that being the case, it's clear you trespassed to some extent on that six feet, and they are entitled to be compensated for that. And that trespass has now gone on for 31 years, probably a little more aggravated since 1963, but nevertheless has gone on for that period of time.

Transcript, June 4, 1987.[7]

Having found a trespass, the District Court set damages based on the land's grazing value, thus rejecting the United States' and Tribe's contention that power site value should be considered. In deciding that the value of the land as part of a power project is a more appropriate

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[7] The PUD incorrectly suggests that the appellate court had none of the transcript and an inadequate record from which to reach its decision. *See* Pet. pp. 11, 23. The Court of Appeals did have portions of the transcript before it, including this section. The PUD had the opportunity to, and did submit, those portions of the transcript it considered pertinent. *See* PUD's and State's Supplemental Excerpt of Record, Phase III, Vol. V, Ninth Cir. Nos. 88-3617, 88-3618, 88-3619, 88-3669, 92-35504, pp. 915-916.

measure, the Court of Appeals noted that the damage formula urged by the PUD would encourage others to use Indian reservation lands for power production without complying with the FPA. 28 F.3d at 1551, Pet. App. 17a-18a. The Court did not rule that an injunction must issue but found that the District Court's denial rested on the erroneous legal premise that the lands could be inversely condemned. It remanded the question of injunctive relief for reconsideration. *Id.* at 1551-1552, App. 19a-21a.

REASONS FOR DENYING THE WRIT

This litigation has no importance beyond the situation created by the PUD's trespass. No novel questions of law are presented and no conflict of decisions exists. All the PUD's arguments run counter to precedent. The alleged discrepancies between the Court of Appeals' rulings and the record are not well-founded. The assertions of numerous factual disputes only leave the case in a confusing posture. The Court of Appeals properly decided phase 3 of this litigation.

Federal Courts Have Jurisdiction To Adjudicate A Claim Of Trespass On Indian Trust Lands And To Award Damage And Injunctive Relief

Federal courts have jurisdiction to decide whether the possessory rights of Indians to their lands under federal law have been violated and to grant appropriate relief. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235-236, n.6 (1985); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979). The

PUD acknowledges federal court jurisdiction to determine "the property issues" but argues an exception for "trespass." Pet. p. 29. There is no support in law or logic for that distinction. The Court of Appeals noted that the PUD had not disputed that federal law controls an action for trespass on Indian lands, and the Court cited case law dating from 1850 recognizing "a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages." 28 F.3d at 1549 n.8, App. 13a-14a. No statute of limitations barred the filing of this case in 1980. *See Oneida Indian Nation*, 470 U.S. at 240-244.[8]

FERC Does Not Have Primary Jurisdiction In This Matter

The action filed by the United States required a forum which could adjudicate title, determine proprietary rights, and award damages and injunctive relief, all of which are beyond the Commission's jurisdiction. Contrary to the PUD's characterization of this litigation, neither the United States nor the Tribe challenged the

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[8] Nor can the PUD rely on the long, ongoing period of unauthorized flooding (Pet. p. 22, etc.), or frustrated expectations that easements would be granted, to establish a right to occupy these lands. The rights of Indians in their trust or restricted property cannot be divested by laches, estoppel, or similar doctrines. *See Cramer v. United States*, 261 U.S. 219, 234 (1923); *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922); *Minnesota v. United States*, 305 U.S. 382, 388-389 (1939); *Swim v. Bergland*, 696 F.2d 712, 719 (9th Cir. 1983); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 699 (9th Cir. 1976); *F. Cohen, Handbook of Federal Indian Law* (1982 ed.) at 525. *See also Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-409 (1917).

propriety of the 1952 license, 1956 order, or 1963 amendment. They did not seek to appeal or collaterally attack any order issued under the FPA regarding the Box Canyon project. The PUD's license and the Commission orders came under consideration at the instance of the PUD.

The Court of Appeals properly held that the PUD's attempt to relitigate the trespass in the remedies phase was barred. *See* 18 C. Wright, A. Miller, & Cooper, *Federal Practice and Procedure,* (West Pub. 1981), § 4418, p. 174 ("Direct estoppel also may arise from action that is designed to conclude part of a single claim on the merits, but to leave the way open for further action on the balance of the claim"); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (dismissal of claim of violation of price regulation was *res judicata* in damage phase of case and in related damage action); *Butler v. Pollard*, 800 F.2d 223 (10th Cir. 1986) (general jury verdict was in effect a determination of the trespass claim, which determination was binding in the injunction phase of the case). In *Metromedia Co. v. Fugazy*, the Court barred relitigation of a fraud issue in a subsequent damage action, explaining that,

> . . . The mere fact that the damages awarded to the plaintiff have not yet been calculated, though normally precluding an immediate appeal . . . does not prevent use of a final ruling on liability as collateral estoppel.

983 F.2d 350, 366-367 (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2445, 124 L.Ed.2d 662. As summarized in Wright, Miller, & Cooper, Vol. 18, § 4434, p. 321:

> . . . Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion . . . to determinations of liability that have not yet been completed by an award of damages or other relief.

Here, the parties had the opportunity to appeal the phase 1 trespass adjudication, which the PUD did. The 1991 affirmance, followed by the denial of certiorari, rendered the trespass determination final and binding.

The Court of Appeals did not exceed its jurisdiction in rejecting the PUD's license defense as plainly without merit as a matter of law. It is not an infringement of Commission jurisdiction for a court to determine that an FPA licensee is violating property rights, and award damages and injunctive relief. *See Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930); *Federal Power Com'n v. Niagara Mohawk Corp.*, 347 U.S. 239, 254-256 (1954). In *Henry Ford & Son*, this Court held that 16 U.S.C. § 803(c) specifically preserves such damage claims. 280 U.S. at 378-379. As recently stated in *Nez Perce Tribe v. Idaho Power*, "It is clear that FERC does not have jurisdiction to adjudicate property disputes or to award monetary damages." 847 F.Supp. 791, 800 (D. Idaho 1994), *appeal docketed*, Ninth Circuit No. 94-36237. The Court ruled that no collateral attack occurs when a tribe sues for damage to property. *Id.* at 802.

It is settled that the Commission lacks jurisdiction to adjudicate property rights, whether the asserted rights are in real property or are water rights. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, this Court ruled that the Commission does not have jurisdiction

> . . . over such questions as the sufficiency of the legal title of the applicant to its riparian rights . . . Section 9(b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by an applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken.

328 U.S. 152, 178 (1946). More recently, in *California v. FERC*, the Court distinguished the Commission's authority over regulatory issues from the authority of other entities over proprietary rights. 495 U.S. 490, 497-498, 503 (1990). While the Commission may be able to inquire into the legal capacity of a licensee, it does not therefore have authority to adjudicate that capacity. *See State of Washington Dept. of Game v. FPC*, 207 F.2d 391, 396-397 (9th Cir. 1953), discussed in *Tacoma v. Taxpayers*, 357 U.S. 320, 340 (1958). *See also Atchison T & S F Ry Co. v. Wichita Board of Trade*, 412 U.S. 800, 821 n.14 (1973), quoting with approval, *Locomotive Engineers v. M.K.T.R. Co.*, 363 U.S. 528, 534 (1960) (no primary agency jurisdiction when the agency and court would conduct different examinations of a dispute, each with a different purpose); *Pennsylvania W.&P. Co. v. Consolidated G., E. L. & P. Co.*, 184 F.2d 552, 562 (4th Cir. 1950); *South Carolina Public Service Authority v. FERC*, 850 F.2d 788, 791-792 (D.C. Cir. 1988). The Commission itself disclaims any authority to resolve the type of dispute presented in this case. *See, e.g., Escondido Mutual Water Co. Project No. 36*, 6 FERC ¶ 61,189 (1979), p. 61,449, *aff'd in part, rev'd in part on other grounds, Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (" . . . the Commission has no authority to adjudicate claims for money damages."); *Idaho Power*

Company, Project No. 1971, 29 FPC 572 (Issued March 22, 1963) (Commission is not the forum in which to litigate issues such as negligence and determine damages).

Ironically, the PUD earlier attempted to delay the Commission staff in taking action based on the PUD's exceeding its licensed project boundary, pending the completion of this litigation. In advising the PUD that it is exceeding the licensed project boundary, the Director of the Commission's Office of Hydropower Licensing was careful to distinguish an adjudication of proprietary rights from his review of the geographic scope of the project, as described in the license. In 1991, Director Springer wrote the PUD:

> I do not agree with the suggestion in your letter of August 29, 1991, that the matter of the project's boundary be held in abeyance pending resolution of the court litigation concerning the property ownership issues. The Commission has the primary responsibility for construing and, if necessary, clarifying or revising the license concerning definition of the project's boundary. *This determination is quite independent from the court's determination of who owns the land that the project is inundating.*

See Letter from Springer to Weis, Attachment G, Declaration of Jeffrey S. Schuster, R. 640 (emphasis added). Commission staff, at least, did not have any trouble in distinguishing the federal courts' jurisdiction over the property issues in this case from the role and purposes of the Commission.

The PUD's construction of its license was in clear conflict with the judicially-established meaning of statutory terms and prior Supreme Court rulings on the FPA's prerequisites for authorizing the occupation of Indian trust lands. These were matters within the ordinary competence of the courts. No technical expertise was needed to dispose of the PUD's contentions. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-306 (1976); *International Brotherhood v. Hardeman*, 401 U.S. 233, 238-239 (1971).

To portray its FPA license as creating a right to occupy the Kalispel lands, the PUD tried to convert a Commission statement describing the project as "affecting . . . allotted lands within the Calispel Indian Reservation," [Order Issuing License, 53a] to a "clear statement [or "conclusion"] by the Commission that the project would occupy allotted lands within the Indian Reservation." Pet. p. 12 n.5, (C), (D). However, there is a significant legal distinction between projects that "affect" Indian trust lands and projects that "occupy" Indian trust lands. Power projects which only "affect" Indian lands do not invoke the same FPA protections as apply when a project is to "occupy" those lands. *Escondido*, 466 U.S. at 784 (" . . . it is clear that Congress concluded that reservations were not entitled to the added protection provided by the proviso in § 4(e) unless some of the licensed works were actually within the reservation."). The PUD also abused the legal definition of "public lands" when it maintained that § 4(e) of the FPA is satisfied by the Commission finding that

> (6) The issuance of license for the project as hereinafter provided will not interfere or be

> inconsistent with the purposes of any withdrawal of public lands . . .

Pet. pp. 5-6, 25. To convert a finding of consistency and no interference with "public lands" to a § 4(e) finding regarding the Kalispel Indian Reservation requires a disregard for the express FPA definition of "reservation." 49 Stat. 838, 16 U.S.C. § 796(1) and (2). This Court has specifically held that Indian trust lands are not "public lands" under the FPA. *Federal Power Commission v. State of Oregon*, 349 U.S. 435, 443-448 (1955). What the PUD refers to as an "express finding" (Pet. p. 5) of consistency mentions public lands and the Kaniksu National Forest but noticeably omits any mention of the Kalispel Reservation. There is no such finding as to Indian trust lands in any of the license documents.

The 1957 license for the Department of Water Resources of the State of California, Project No. 2100 (the only license for another project cited by the PUD to show it was not unusual to authorize occupancy of a reservation in this manner), actually underscores that the PUD license lacks the provisions a court would expect to be included in a license authorizing the occupancy of Indian trust lands. The Order Issuing License for Project No. 2100 explicitly states:

> The project will affect navigable waters of the States, and *will occupy* . . . certain lands held in trust by the United States for Indians.
>
> * * *
>
> The Acting Secretary of the Interior has reported favorably on the application subject to the inclusion in the license of certain conditions . . . for the adequate compensation to

> Indians whose lands would be inundated by the project . . .

17 FPC 262, 262-263 (emphasis added).

> *The Commission finds:*
>
> (1) The project will *occupy* lands of the United States . . .
>
> * * *
>
> (8) The issuance of a license for the project as hereinafter provided *will not interfere or be inconsistent with the purposes of any reservation* or withdrawal of public lands . . .

Id. at 263, 265 (emphasis added). In relying on this license, the PUD omits the significant word "occupy" from its description. Saying instead that "the Commission determined that the project would *affect* 'certain lands held in trust by the United States for Indians;' " it glosses over the express reference to "reservation". *See* Pet. p. 25 (emphasis added).

The contention that Article 33 can be read as authorization to occupy Indian trust lands subject to a claim for compensation not only requires tampering with the plain meaning of that license article but also depends on a misapprehension of the law. Neither the Secretary of Interior nor the Commission could have authorized what would amount to an inverse condemnation of Indian trust lands. *See United States v. Clarke, supra; F. Cohen, Handbook of Federal Indian Law* (1982 ed.) at 517 ("Executive action to authorize alienation of tribal lands is ineffective absent express congressional authority."). By characterizing an express prohibition of interference or damage as an authorization of occupancy, it is the PUD,

not the Court of Appeals, which "has eviscerated license Article 33." *Cf.*, Pet. p. 21.[9]

The PUD's construction of its license was thus foreclosed by prior judicial interpretations.[10] No agency adoption of the PUD's construction could have been sustainable, since it conflicted with clear statutory requirements for locating a "project work" on an Indian reservation. *See Escondido*, 466 U.S. at 779-783 and n.22. The PUD claim did not turn on technical issues but on broader, legal issues which "belong to the sphere of judicial rather than agency expertise." *See State of Cal., ex rel. Water Res. Bd. v. FERC*, 877 F.2d 743, 745-746 (9th Cir. 1989).

Until the Court of Appeals issued its 1994 decision, the PUD maintained that the Court had jurisdiction and a duty to determine whether the license authorized the

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[9] Liability provisions in a FPA license reflect obligations to protect property and are distinct from any eminent domain power. *See Seaboard Air Line R. Co. v. County of Crisp*, 280 F.2d 873, 876-877 (5th Cir.), *cert. denied*, 364 U.S. 942 (1960).

[10] Aside from the absence of license provisions which would be required by § 4(e), the PUD has not explained the absence of annual charges for the use of Kalispel lands. Whether those lands were tribal or allotted, annual charges would have been required since the United States held an ownership interest. 16 U.S.C § 803 (e). Allotted trust lands constitute a "reservation" under the FPA and also invoke the requirements of § 4(e). *Cf.* Pet. p. 24. *See* 16 U.S.C. § 796(2) ["and other lands and interests in lands owned by the United States"]; *Escondido*, 466 U.S. at 781. The Commission statement (Pet. pp. 16, 22) that "allotted lands" were affected did not constitute a finding that all the Indian lands "affected" were allotted, however. As discussed in the Statement of the Case, some of the lands were in tribal trust status at all relevant times.

occupancy of Indian trust lands. In its opening brief on appeal, it said:

> . . . All that remained to be done, and which the District Court failed to do, is to complete the litigation by determining that the PUD had a legal right under its license to occupy such lands and the method to be used for the determination of compensation for future damages. Indeed, as previously shown, it would have been a simple matter for the District Court to issue a Declaratory Judgment concerning the PUD's legal rights under its license and to establish the method to be used for future compensation. The record is clear and complete and fully supports the remedy requested by the PUD. This Court can grant such remedy based upon the record before the District Court and that is now before this Court. The refusal of the District Court to provide such a remedy was an abusive [sic] discretion because it did not provide full and complete adjudication of the issues and will lead to continuous litigation in the future.

Corrected Brief of PUD, Appellee and Appellant, Phase III, Ninth Cir. Nos. 88-3617, Etc. (November 18, 1992), p. 65 (citation omitted). On October 5, 1987, following the district court's declaration of a trespass and reservation boundary determination at 2028 feet, the PUD had filed a motion for an order

> declaring that under the license and amendment issued by the Federal Power Commission for Project No. 2042, the PUD is entitled to operate the Box Canyon project so long as the backwater does not exceed elevation 2041 at the U.S.G.S. Cusick Gage and two (2.0) feet of backwater on

> the tail race of Albeni Falls Dam as long as the PUD pays damages for the use of Indian Land on the Kalispel Indian Reservation based upon loss of grazing.

PUD's Motion For Declaratory Judgment Re: Operation Of The Box Canyon Project And Future Damages Based On Grazing Values, filed October 5, 1987. *See also* PUD's Motion to Amend to Conform to the Evidence, filed October 5, 1987. The United States opposed the PUD's motion on behalf of the Kalispels because the PUD sought to end-run the Federal Power Act licensing process and have the Court set future payments for the continuing occupancy of Indian trust lands. *See* United States' Memorandum in Opposition, (November 23, 1987), p. 11. Future annual charges for the occupancy of Indian trust lands, as opposed to damages for a trespass, is a matter properly left to the Commission, when and if occupancy of the Indian trust lands is permitted in accordance with the FPA.

In Barring Inverse Condemnation, *United States v. Clarke* Followed The Well-Settled Principle That The Use And Ownership Of Indian Trust Lands May Only Be Acquired In The Manner And To The Extent Congress Has Authorized

United States v. Clarke did not change the law. By the 1950's, when the PUD first flooded the Kalispel trust lands, it was well-established that conveyances of interests in Indian trust land require Congressional authorization; neither tribal nor allotted trust lands could be subject to a condemnation under state law that Congress had not "specifically" authorized. *See Felix S. Cohen's*

Handbook of Federal Indian Law, (U. New Mex. 1942 ed.), pp. 310, 381; *Minnesota v. United States*, 305 U.S. 382, 389 (1939). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. at 233-234; *F. Cohen, Handbook of Federal Indian Law* (1982 ed.) at 510-528.

The decision in *United States v. Clarke* is sound. In *Clarke*, the Court concluded that Congress has not provided the specific authorization required for an inverse condemnation of Indian trust lands. The Court found no such authorization in 25 U.S.C. § 357, 31 Stat. 1084, which permits judicial condemnation of allotted trust lands. It rejected the contention the PUD wants to litigate here: that an eminent domain action need not precede a taking. 445 U.S. at 255, 259. The Court ruled that allotted Indian trust lands may only be condemned through a formal judicial proceeding in accordance with *Minnesota v. United States*. 445 U.S. at 254.

Rather than invoke the procedures and standards of the FPA governing the occupation of Indian trust lands for power purposes, the PUD seeks to establish a right to flood the Reservation by an inverse condemnation for which there is no Congressional authorization. Other than expressing concern for its own circumstances, the PUD offers no justification for overruling *Clarke*. Moreover, overruling *Clarke*, which construes 25 U.S.C. § 357, would not legitimize the PUD's actions. That statute only applies to allotted trust lands. It is inapplicable to tribal trust lands, which cannot be condemned by inverse condemnation or formal, judicial condemnation. *See Nebraska Public Power District v. 100.95 Acres of Land*, 719 F.2d 956,

961-962 (8th Cir. 1983); *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005-1006 (8th Cir. 1976). Any rise in the water level along the reservation would necessarily flood tribal trust lands. Thus, whatever authority there is to condemn the allotted lands would be insufficient to accomplish a lawful occupancy of this Reservation area. 28 F.3d at 1553 n.18, App. 24a.

The PUD's argument that § 21 of the FPA authorizes the condemnation of these Indian trust lands is also foreclosed by Supreme Court precedent. Whether the Kalispel land is tribal or allotted, the FPA does not permit eminent domain powers to be exercised over Indian trust lands. As explained in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 113-114 (1960):

> . . . By § 21, 16 U.S.C § 814, licensees are authorized to *acquire* "the lands of property of others necessary to the "licensed project" by the exercise of the right of eminent domain" in the federal or state courts, and, of course, upon the payment of just compensation. But, despite its general and all-inclusive terms, § 21 does not apply to nor authorize condemnation of lands or interests in lands owned by the United States, because § 10(e) of the Act, 16 U.S.C 803(e), expressly provides that the license shall pay the United States reasonable annual charges . . . for recompensating *it* for the *use, occupancy, and enjoyment* of *its* lands or other property (emphasis added) devoted to the licensed project.

See Court of Appeals, (Phase 3), 28 F.3d at 1549 n.5; App. 11a-12a n.5.

The District Court had refused to issue an injunction, relying on state law and the incorrect premise that inverse condemnation of the Indian trust lands was permissible. *See* Conclusion of Law (August 10, 1987) # 1, App. 42a (" . . . where a municipality has damaged land for public purposes, such as in this case, the only remedy authorized under state law is just compensation for such taking."). The Court of Appeals reversed. 28 F.3d at 1551. It did not rule that an injunction must issue but remanded the injunction request for reconsideration in light of the proper legal standard.

The Court of Appeals Did Not Reverse Any Findings Of Fact And Its Rulings Were Adequately Supported By The Record

The Court of Appeals' statement that the PUD flooded the Indian trust lands, knowing it had no right to do so, is well-supported in the record. *See* Findings of Fact (August 10, 1987), # 9, 10, App. 37a, 39a-40a. The PUD does not point to any statute, regulation, or legal principle which would have authorized it to occupy Indian trust lands simply because it felt "frustrated" by the BIA review process, a reluctance of the Indians to grant the PUD the desired easements, or some other factor posing a delay or obstacle. *See* Pet. p. 22. Moreover, even if easements to flood all the Kalispel lands throughout the year had been granted, those easements would not be sufficient. Unless the PUD had a permit or valid existing right-of-way granted prior to June 10, 1920, which it did not, an FPA license was required to occupy reservation trust lands. *See* FPA § 23(b), 49 Stat. 839, 846, 16 U.S.C. § 817. *See also Lac Courte Oreilles Band, Etc. v.*

Federal Power Com'n, 510 F.2d 198, 209 n.40 (D.C.Cir. 1975).

While contending, on the one hand, that it believed no Indian trust lands would be flooded, the PUD also claims it fully advised the FPC that Indian trust lands would be occupied and the Commission made the necessary findings under § 4(e) of the FPA, 41 Stat. 1066, as amended, 16 U.S.C. § 797(e). The PUD's contentions are unsupported by the record. The District Court's finding regarding a lack of bad faith cannot be equated with a finding that the PUD had made a good faith effort to comply with the special federal law provisions governing occupation of Indian trust lands. To the contrary, the Court explained its rationale this way:

> . . . But it seems to me that under all the circumstances that there is no bad faith because you have tried to treat them [referring to the Indians] as you would other people, even though they get treated differently.

Trial Tr., June 4, 1987, PUD's and State's Supplemental Ex. R., Phase III, Ninth Cir. Nos. 88-3617, etc., Vol. V, p. 932.

The Court of Appeals had adequate support in the record for the observation that the absence in the license of provisions required by the FPA for such occupancy "apparently resulted from the failure of the Utility to disclose that Reservation land would be flooded by the project." 28 F.3d at 1548, App. 10a. According to the PUD's license application, the project boundaries were to be six miles downstream from the Kalispel Reservation. *See* License Application Exhibit K, Sheet 9, Pl. Ex. 1016, Appellants' Joint Excerpt of Record, Phase III, Ninth Cir.

Nos. 88-3617, etc., p. 75. *See also* Affidavit of August Mueller, August 24, 1987, Joint Excerpt, p. 76 (confirming this reading of Exhibit K). The license incorporated the Exhibit K map to describe the project. App. 54a.[11] The license states that the project would raise water levels in normal flows "for possibly 24 miles upstream" for flows up to about 90,000 cubic feet per second, and that for flows above that, "the operation of the project will have little if any effect on water levels." App. 58a-59a. The Reservation is located 30 miles upstream. *See* Letter from Acting Secretary of the Interior, Searles, to Buchanan, Jan. 18, 1952, App. 72a. This limited, geographic scope of the licensed boundaries is not a matter of potential technical dispute with Commission staff. The Director of Hydropower Licensing has the same interpretation. *See* Letter from Director, Office of Hydropower Licensing to Weis,

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[11] A revision of Exhibit K was contemplated. 11 FPC at 787-788; License Art. 38, App. 65a. In the October 3, 1956 Order Approving Exhibit And Prescribing Annual Charges, a revised Exhibit K was approved "to establish the area of Government lands partly within the Kaniksu and Colville National Forests occupied by the project and to fix and specify the annual charges." 16 FPC 1008. The Commission revised the license to cover all lands within the license project boundary, as shown by Exhibits J and K (as revised). Again, the Kalispel Reservation was not included within these exhibits or descriptions. In regard to the increased backwater, the Commission determined that only a "minor" change was required, which was to include 0.29 acres of U.S. national forest lands, with a corresponding increase in annual charges. 29 F.P.C. 534 (1963). The PUD's Application For Amendment Of License had represented that only a "minor" change in the project boundary would be needed and that the upstream project boundary was sufficient. Application For Amendment Of License, June 5, 1961, Appellants' Joint Excerpt of Record (Phase III) at 78.

Attachment G, R. 640. This correspondence was before the Court of Appeals. *See* Brief of Kalispel Indian Tribe, Appellant, pp. 18-19, n.2. The PUD does not explain how the factual disputes it alleges, even if well-founded, would warrant a grant of certiorari. *See N.L.R.B. v. Hendricks County, Etc.*, 454 U.S. 170, 177 n.8 (1981).

No Question Has Been Presented For Review Regarding The Merits Of The Decisions On Damages And Injunctive Relief; If Considered, Those Decisions Do Not Warrant Grant Of The Writ

The PUD did not present any question for review as to the propriety of the measure of damages adopted by the Court of Appeals or the appropriateness of injunctive relief. The Tribe assumes that the Court therefore will not consider the arguments on those matters, as provided in Rule 14(a).

In the event the Court does consider those matters, the measure of damages adopted, which accounts for the value of the Indian trust land as a part of the Box Canyon project, is consistent with the common law on trespass damages. The remand to the District Court of the request for injunctive relief corrects the lower court's erroneous assumption that the PUD could obtain lawful authority to occupy the Kalispels' trust land by inverse condemnation.

On appeal, the Tribe argued that trespass damages should not have been limited to grazing value but should have accounted for the lands' value for power generation. The Tribe argued that trespass damages, also referred to as "mesne profits", customarily account for the value of

the land during the trespass, rather than prior, actual use. *See* Dobbs, *Remedies* (West Pub. Co. 1973), § 5.8, p. 365. It is within the authority of the federal courts to award Indians the "rents, issues, and profits" from the illegal occupation of their lands. *See U.S. v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 344, 359 (1941); *Oneida*, 470 U.S. at 235-236. *See also* 28 F.3d at 1548 n.8, App. 13a-14a.[12]

Adopting a measure of damages based on power value did not require finding that the PUD acted in bad faith. The Court of Appeals' measure of damages is supported by the concern that excluding the lands' value as part of the power project "would encourage others to use Indian reservation lands for power production without complying with the Power Act." 28 F.3d at 1551, App. 17a-18a. It is proper to consider whether the measure of damages would reward the trespasser for failing to obtain lawful authority to occupy the land. *See Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957) (what the trespasser would have been required to pay absent

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[12] Both state and federal common law support the measure. *See, e.g., Lownsdale v. Grays Harbor Boom Co.*, 36 Wash. 198, 207-209, 78 P. 904 (1904) (jury instruction proper which included the businesses or uses for which the lands were suitable during the trespass period); *Columbia and C., R.R. Co. v. Histogenetic, & C. Co.*, 14 Wash. 475, 480-481, 4 P. 29 (1896) (landowner entitled to enhanced rental value due to trespasser's improvements). The fact that the PUD knowingly violated its limited easements on Kalispel lands and sought easements from the BIA when it failed to advise the Commission that Kalispel lands were to be inundated, provides an additional reason for rejecting the District Court's measure of damages. *See Andersen v. Bureau of Indian Affairs*, 764 F.2d 1344, 1348 (9th Cir. 1985) (knowingly planting crops when lease terminated entitles Indian owner to profits).

the trespass is the appropriate measure of damages); *United States v. 5,677.94 Acres of Land*, 162 F.Supp. 108, 117-118 (D. Mont. 1958) (policy of FPA to ensure tribes are fairly compensated for use of reservation power sites may not be circumvented).

The Kalispels should not be foreclosed from establishing their damages using an acceptable method of setting annual charges under the FPA. Otherwise, they are being penalized for the unlawful occupancy of their lands. *See Confederated Salish and Kootenai Tribes v. United States*, 417 F.2d 1340, 189 Ct. Cl. 319 (1969) (tribe entitled to power value of its lands and should have the opportunity to show a denial of the full power value). As held by the Court of Appeals, use of the power site formula "will also assure that the Tribe will not suffer an uncompensated loss from the Utility's past failure to comply with the Power Act and will encourage future compliance." 28 F.3d at 1551, App. 17a.[13]

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[13] Confining its damage calculations to past grazing uses, the district court ignored what the PUD acknowledged was the highest and best use of the land for the prior 30 years, i.e., the land's power value. *See* Partial Transcript of Proceedings for June 2, 1987 at 153, R 614; *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 370-372 (1948) (present development of power site is convincing proof of the land's value and availability for that purpose). Power value was the major component of the land's market value during the period of trespass. In the context of a voluntary acquisition of the right to use the Kalispel lands, their power site value could be expected to enter into a compensation agreement. *Cf. Grand River Dam Authority v. Grand-Hydro*, 335 U.S. at 372-373. *See Confederated Salish and Kootenai Tribes v. United States, supra. See also Andersen v. Bureau of Indian Affairs*, 764 F.2d at 1348 (it is neither fair nor reasonable to limit tribal recovery to rent due, since tribe could have chosen to use land so as to obtain the profits itself).

Although there may be no fixed formula for the setting of annual charges required by the FPA, when Indian trust lands are made part of a power project, it is clear such annual charges have not been limited to the lands' value absent the project. Valuing the land in proportion to the power benefit it confers is certainly an accepted measure. *See City of Vanceburg, Ky. v. FERC*, 571 F.2d 630, 646 (D.C. Cir.), *cert. denied*, 439 U.S. 818 (1977); *Montana Power Company v. Federal Power Commission*, 459 F.2d 863, 869 (D.C. Cir. 1972). *See also* FERC Opinion No. 36, 6 FERC ¶ 61,189 at 61,432-61,433 (while annual charges in that case would not be based on most profitable use, net benefits method would be used).[14]

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[14] Contrary to the assertion of the PUD, Pet. 27, the damages determined by the district court were not consistent with compensation awardable when a right of eminent domain exists. Under federal condemnation, the value of the land for power generation is an appropriate measure of damages whether or not the lands are in Indian trust status. *See Public Utility No. 1 of Pend Oreille County v. Seattle*, 382 F.2d 666 (9th Cir. 1967), *cert. dismissed*, 396 U.S. 802 (1969). Current use of property is proof of its value and suitability for such purpose. *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 372 (1948).

The PUD Has Had Ample Opportunity To Apply For A License Amendment Authorizing Occupancy Of The Kalispel Lands In Accordance With The Federal Power Act But Has Failed To Do So

Following the federal court adjudication of land ownership, FERC staff advised the PUD several times that it was exceeding its licensed project boundary, and suggested it apply for a license amendment. *See* Letter, Director, Office of Hydropower Licensing to Weis, Attachment G, R. 640. Rather than doing so, the PUD has pursued meritless contentions and now wants *Clarke* overruled so that it does not need to satisfy the Congressionally mandated prerequisites for occupying Indian trust lands for power purposes.

CONCLUSION

No adequate justification has been shown for certiorari and the writ should be denied.

Dated this 16th day of February, 1995.

Respectfully submitted,

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EVERGREEN LEGAL SERVICES

In The

Supreme Court of the United States

October Term, 1994

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, and KALISPEL TRIBE OF INDIANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PUD'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

There are numerous misstatements of fact made by the court of appeals and adopted in the Brief for the United States in Opposition (U.S. Brief) and the Kalispel Indian Tribe's Brief in Opposition (Tribe's Brief). Most of these were addressed in the Petition. Public Utility District No. 1 of Pend Oreille County (PUD) will only address additional misstatements of fact by the Tribe and the United States (Government) that are material to the issues raised by the PUD's petition.[1]

The questions presented by the PUD's petition involve (1) whether the court of appeals had jurisdiction to attack, and effectively overrule, orders issued by the Federal Power Commission (FPC) now the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA) [16 U.S.C. § 791a, *et seq.*]; (2) whether the holding in *United States v. Clarke*, 445 U.S. 253 (1980) should be overruled or distinguished as inapplicable in this case; and (3) whether the court of appeals properly made "findings" which are not supported by the

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[1] The Tribe's Brief, pp. 13 and 24, attempts to bring in extrajudicial matters in an effort to prejudice the consideration of the PUD's petition. A similar effort was rejected by the court of appeals. (Pet. App. at 122, note 7) The Tribe's Brief also misstates the substance of the correspondence with the FERC. The FERC requested that the PUD amend the "project boundary" for the project. The PUD has advised the FERC that the voluntary application to amend the project boundary by the PUD could prejudice the PUD's rights under the license. *See* FPA § 6 [16 U.S.C. § 799].

record and are inconsistent with the actual findings entered by the district court based upon the entire record.

ARGUMENT

1. The District Court And The Court Of Appeals Had No Jurisdiction To Collaterally Attack The PUD's License.

Certiorari should be granted in this case to reverse the appellate court's decision which unlawfully invades the jurisdiction and authorization which Congress delegated exclusively to the FPC and which is subject to review in an appellate court only if an aggrieved person follows the procedures prescribed by Congress in FPA § 313 [16 U.S.C. § 825*l*]. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). All issues inhering in the license are deemed to have been resolved and are not subject to subsequent *de novo* litigation. *Id.* Without review, the Government will be encouraged to attack existing FPA licenses using any basis it can conjure up, thereby upsetting the finality and certainty Congress intended a license to have under FPA § 6, § 28, § 313(b) [16 U.S.C. § 799, § 822 and § 825*l*(b), respectively].

The determination of conditions for the operation of the PUD's Box Canyon Project was within the exclusive jurisdiction of the FPC under the FPA. FPA § 4(e) and § 10(a) [16 U.S.C. § 797(e) and § 803(a), respectively]. Congress has plenary power over navigable waters and interstate commerce and has exercised its power by adopting the FPA. Congress delegated to the FPC the determinations of whether a project should be licensed

and the conditions under which such license should issue. *California v. FERC*, 495 U.S. 490, 496 (1990); *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 170-173 (1946); and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 423-427 (1940), *reh. den.* 312 U.S. 711 (1941). The licensing determinations with respect to dams on navigable rivers are legislative in character. *See United States v. Appalachian Electric Power Co.*, 311 U.S. at 423-424. The owner of riparian lands affected by a project are generally not entitled to anything for the value of the water power that can be developed using the land. 311 U.S. at 427. Determinations made by the FPC are final, subject only to judicial review pursuant to FPA § 313(b) [25 U.S.C. § 825*l*(b)]. *Tacoma v. Taxpayers of Tacoma*. The goal of Congress in passing the FPA was to encourage the development on the nation's water resources. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. at 174. The finality and certainty of the FPC's license determinations under the FPA are also supported by FPA § 6, § 28 [16 U.S.C. § 799 and § 822, respectively]. FPC decisions should be upheld if they are within the FPC's jurisdiction. *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843-845 (1984).

In their statements of the case (e.g. U.S. Brief at 4 and Tribe Brief at 7) the Government and the Tribe have assumed the very question to be decided, which is not helpful and is unpersuasive. *See Escondido Mutual Water Co. v. LaJolla Bank of Mission Indians*, 466 U.S. 765, 777 (1984). The Government and the Tribe have relied upon and adopted the misstatements of the court of appeals

with respect to Article 33 and the alleged lack of determinations under FPA § 4(e)[2] and § 10(e)[3] [16 U.S.C. § 803(e)] and the alleged bad faith of the PUD.[4] It is the PUD's contention that neither the district court nor the court of appeals had jurisdiction to review the FPC's licensing processes or orders.

The Government argues that the PUD agreed to jurisdiction of the court when the PUD argued for a declaratory judgment concerning the PUD's legal rights under the license. U.S. Brief at p. 10. *See also* Tribe's Brief at pp. 17-18. In its brief to the court of appeals, (1) the PUD was responding to the Government's and Tribe's claim for an

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[2] The FPC's Finding (6) states that the license will not interfere or be inconsistent with the purpose for which public lands were withdrawn. Pet. App. at 61a. The Kalispel Indian Reservation was created by a 1914 Executive Order which withdrew public lands. IV C. Kappler, *Indian Affairs – Laws & Treaties at 1051* (Senate Document No. 53, 70th Congress, First Session, U.S. Government Printing Office (1929)). The FPC made a § 4(e) finding.

[3] FPA § 10(e) allegations are based upon an assumption that the lands affected by the Project were "tribal lands" in 1952 and 1963 when the license orders were issued. There is no record to support the allegation. The Commission identified the Indian lands as "allotted lands." Pet. App. at 53a. The Tribe may have purchased allotted lands after 1963. Such purchase should have no effect upon the Commission's rulings in 1952 or 1963. *See* FPA § 24 [16 U.S.C. § 818]; and *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). The effect of the purchase of allotted lands was neither presented to the district court nor the appellate court and is not ripe for review here.

[4] Pet. App. at 10a, 14a. The appellate court should not have reversed the district court's finding of good faith at Pet. App. 39a. *Ripley v. United States*, 220 U.S. 491, 496 (1911).

injunction prohibiting the PUD from occupying any Indian land; and (2) the PUD was seeking a declaration of the obvious based upon the language of the FPC's licensing orders.[5] It was the PUD's contention that so long as the PUD maintained its operations within the restrictions placed by the FPC in its orders, the PUD was not "trespassing" even though the PUD is required to pay reasonable compensation for damages to Indian lands pursuant to license Article 33, which the PUD has always been willing to do. Although the district court's decision did not affect the PUD's rights under the FPC license, the appellate court's decision substantially affected such rights.[6]

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[5] The PUD claims the right to back water up to two feet on the Albeni Falls Project for flows of less than 90,000 CFS so long as the PUD did not cause the waters to rise above the level reached by the mean annual flood flow along the river, which includes the right to "affect" "allotted" lands in the Kalispel Indian Reservation. Pet. App. at 47a, 53a, 58a ¶ (4), 60a ¶ (7), and 72a. Neither the Government nor the Tribe has explained the inconsistency between the FPC's orders in 1952 and 1963 and the appellate court's conclusion that the PUD can't affect Indian lands in 1994.

[6] The district court's conclusion re: "trespassing" was harmless error since the district court denied the Government's and Tribe's request for an injunction and determined the compensation owed for the damages to Indian lands based on fair rental value. The court of appeals' conclusion re: "trespassing" was not harmless error since the court of appeals reversed the district court's decision with respect to injunctive relief and concluded that the PUD should pay compensation based upon power site value, which appears to be completely contrary to the holding of this Court in *United States v. Appalachian Electric Power Co.*, 311 U.S. at 427-428.

The issues which were within the jurisdiction of the district court, and therefore the court of appeals on appeal, related to the determination of the title to land and the amount of compensation to be paid for the use of or damages to Indian lands. There, the jurisdiction of the district court and the court of appeals ends.

2. *United States v. Clarke*, 445 U.S. 253 (1980) Should Be Reconsidered And Distinguished Or Overruled.

The Government argues that interpreting the license to permit the PUD to flood Indian lands would authorize unlawful "inverse condemnation" on such lands, citing *United States v. Clarke*, 445 U.S. 253 (1980). U.S. Brief at pp. 6-7 and note 2. The PUD contends that this Court should reconsider and either distinguish this case from the holding in *Clarke*, or *Clarke* should be overruled. (Pet. 27-29)

The construction given by this Court to 25 U.S.C. § 357 in *United States v. Clarke* has led to extraordinary claims, not only in this case against the PUD, but in other cases. *See Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1443 (9th Cir. 1987). In *Etalook*, the claimant sought ejectment, quiet title to the improvements built by the Alyeska Pipeline Service Company, an accounting for the profits and an injunction barring continued trespass. 831 F.2d at 1443. In *Etalook*, the district court, awarded damage for fair rental value covering the time of occupancy prior to the formal condemnation. In addition, the *Etalook* court denied the claim for ejectment, title to the improvements placed on the lands, and punitive damages or a claim to pipeline profits. The *Etalook* court noted that where a

"trespasser" did not act in bad faith and had paid for an easement (which the PUD was always ready, willing and able to do in this case), the proper measure of damages was the reasonable rental value of the property for the duration of the "trespass." 831 F.2d at 1444. That is precisely what the district court determined in this case.[7]

It is suggested that this Court's opinion in *Clarke* is overly restrictive and is inconsistent with the intent of Congress when viewed in the context of the law. Congress enacted what is now 25 U.S.C. § 357 in 1901. 31 Stat. 1084. In 1901, the federal Indian policy was assimilation of the Indian people into the general society of the United States. One goal of assimilation was to have the same laws applied to Indians as is applied to non-Indians. F. Cohen, *Handbook of Federal Indian Law*, 131 (1982 ed).

The United States is a necessary party in a condemnation action under 25 U.S.C. § 357. *Minnesota v. United States*, 305 U.S. 382 (1939). If there is a dispute over title to the land at issue, a district court does not have jurisdiction to entertain a quiet title action to resolve such dispute with respect to lands claimed for or on behalf of Indians. 28 U.S.C. § 2409(a). Thus, a person possessing the power of eminent domain who also has claim to the Indian lands that are in dispute has no remedy to resolve the title dispute prior to an "inverse condemnation" action by the United States for damages, as occurred here.

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[7] Findings 9 and 16, Pet. App. 37a-39a and 41a. Here, after title to the land at issue was determined, the PUD commenced a condemnation action, a fact which was taken into consideration by the district court when it denied the injunction requested by the Government and the Tribe. Finding 15, Pet. App. 41a.

Contrary to the arguments made by the Government and the Tribe, the dispute presented to the district court and the court of appeals need not result in a determination that the PUD "trespassed" on Indian lands. Rather, the case should have been resolved in the same manner as the court in *Etalook*. As in *Etalook*, the PUD commenced a condemnation action and the district court determined the PUD acted in good faith and determined the compensation that should be paid for the Indian lands at issue, which was in essence the rental value of the land. Pet. App. 37a, 41a and 45a-46a.

Here, there is the additional fact that the PUD's operation of the Box Canyon Project and its effects were analyzed and approved by the FPC in its licensing orders and provisions were made for the payment of damage in Article 33 in the license, which Article was included at the request of the Acting Secretary of the Interior. The district court determined the damages to be paid with respect to the Indian lands. The Government elected to present the issue of damages to the district court.

The PUD urges this Court to reconsider *Clarke*, where the land title is in dispute and where state eminent domain law includes "inverse condemnation" as the only remedy for a landowner. *See United States v. Clarke*, 590 F.2d 765 (9th Cir. 1979); and *Kincaid v. Seattle*, 134 Pac. 504 (Wash. 1913) *reh. den.* 135 Pac. 820 (1913).

3. The Court Of Appeals Had No Basis For Reviewing The FPC And District Court's Findings And Conclusions.

When the Government and the Tribe filed their appeals to the decision of the district court, the Government and the Tribe elected to forego filing any portion of the transcript of the proceedings before the district court. PUD's and State's Supplemental Excerpt of Record, Phase III, Vol. III, pp. 454-457 in court of appeals Nos. 88-3617, 88-3618, 88-3619, 88-3669 and 92-35504. The issues presented by the Government and Tribe to the court of appeals related to the denial of an injunction and the damages awarded by the district court. Such issues are fact-bound. The rules of the court of appeals expressly provide that where there is any challenge to the admission of evidence or where an issue on appeal challenges any other ruling, order, finding of fact or conclusion of law of the district court, the appellant is required to include, in an excerpt of record, all portions of the transcript of proceedings where there was any discussion by the court or counsel relating to the ruling of the court. FRAP for Ninth Circuit, Rule 30-1.2(a)(vii) and (viii). The PUD contends that without a record, the appellate court could not reverse the district court's decision with respect to injunctive relief or damages.

Based solely upon arguments made by the Government and the Tribe, determined that the "measure of damages for the Utility's trespass" should be based upon power site values. Pet. App. at 17a. There is no basis for such conclusion in the record. The court of appeals acknowledged that such determination is neither necessary nor required by any law or regulation applicable to

FPC decisions and that such determinations are usually made by the FPC. *Id.* This is simply another example of the appellate court's invasion of the exclusive jurisdiction and prerogatives of the FPC in violation of the FPA.

CONCLUSION

The Court should grant the PUD's petition.

RESPECTFULLY SUBMITTED this 16th day of March, 1995.

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